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No. _____

In the

Supreme Court of The United States

OCTOBER TERM, 1998

LYNDEN AIR FREIGHT, INC.,

Petitioner,

v.

DIRECTOR OF TAXATION, STATE OF HAWAII,

Respondent.

Petition for a Writ of Certiorari to the
Supreme Court of the State of Hawaii

PETITION FOR A WRIT OF CERTIORARI

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February 23, 1999

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QUESTIONS PRESENTED

1. Whether the preemption of state taxes on the sale of air transportation and on gross receipts from air transportation within the meaning of 49 U.S.C. § 40116(b), or its predecessor 49 U.S.C. § 1513(a), preempts a state tax on a portion of the gross receipts of an air carrier from the sale of air cargo services?

2. Whether the definition of "interstate air transportation" in 49 U.S.C. § 40102(a)(25), or its predecessor 49 U.S.C. § 1301(21), includes ground activity integral to the air transportation service of an air carrier?

LIST OF PARTIES

Pursuant to Rule 14.1(b) and Rule 29.6, the following list identifies all the parties to the proceeding before the Supreme Court of Hawaii.

Lynden Air Freight, Inc., a wholly owned subsidiary corporation of Lynden Incorporated, appellee below.
Lynden Incorporated has no non-wholly owned subsidiary corporations.

Ray K. Kamikawa, Director of Taxation, State of Hawaii, appellant below.

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DIRECTOR OF TAXATION, STATE OF HAWAII,

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Petition for a Writ of Certiorari to the
Supreme Court of the State of Hawaii

PETITION FOR A WRIT OF CERTIORARI

Lynden Air Freight, Inc., respectfully petitions for a writ of certiorari to review a judgment of the Supreme Court of Hawaii, which held that a federal law which "expressly preempts gross receipts taxes on the sale of air transportation,"[1] does not preempt Hawaii from taxing gross receipts from the sale of air cargo transportation to the extent such gross receipts can be attributed to the cost of activities that take place on the ground.

[1] *Aloha Airlines v. Director of Taxation*, 464 U.S. 7, 11 (1983).

OPINIONS BELOW

The Notice and Judgment on Appeal of the Supreme Court of Hawaii is reprinted at Pet. App. 1a. The opinion of the Supreme Court of Hawaii, reported as *Director of Taxation of Hawaii v. Lynden Air Freight, Inc.*, 968 P.2d 653 (Haw. 1998), is reprinted at Pet. App. 2a. The opinion of the Tax Appeal Court of Hawaii is reprinted at Pet. App. 18a.

JURISDICTION

The Supreme Court of Hawaii issued its opinion on November 25, 1998, and a Notice and Judgment on Appeal on December 23, 1998. The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

This case involves the definition of air transportation as originally enacted by the Civil Aeronautics Act of 1938, 49 U.S.C. § 1301(21), and the state tax preemption provision as originally enacted by the Airport Development Acceleration Act of 1973, 49 U.S.C. § 1513, and as both were recodified in 1994 as 49 U.S.C. §§ 40102(a)(25) and 40116(b), respectively. The pertinent portions of these statutes are reprinted at Pet. App. 21a through 23a.

STATEMENT OF THE CASE

Background. Hawaii imposes a general excise tax on gross receipts of manufacturers and service businesses, Haw. Rev. Stat. § 237, and on the gross receipts of public service companies, including airlines and motor carriers, Haw. Rev. Stat. § 239, to the extent Hawaii's Director of Taxation determines taxation is permitted by law. In *Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7 (1983) ("*Aloha Airlines*"), this Court held that Hawaii's excise tax on airlines was preempted by federal law because 49 U.S.C. § 1513 "expressly preempts gross receipts taxes on the sale of air transportation or the carriage of persons traveling in air commerce." *Id.* at 11.[2] In the intervening years, the State's Director of Taxation has imposed the state's excise taxes on companies providing air cargo and helicopter services, based on various narrowing interpretations of this Court's *Aloha Airlines* decision. *See* Pt. II.B.1.

Lynden Air Freight, Inc. ("Lynden") sells interstate and international air freight transportation services, from the customers' location to the freight's destination. Pet. App. 4a. Customers pay a single fee; one airway bill is used for the entire journey, and the sale is trSeated as a single item in Lynden's invoice and in its internal books and records. *Id.* at 5a; R.A. 202-06. Lynden hires airlines to transport the freight by air and motor carriers to perform the attendant pickup and delivery. Lynden, however, is responsible for, and retains control of, the entire transportation of the freight, and itself maintains sorting

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[2]Section 1513 was recodified as 49 U.S.C. § 40116 in 1994, *see* Pub. L. 103-272, 108 Stat. 745. The recodification was technical and not intended to make any substantive changes. *See* H.R. Rep. No. 103-180 (1993), *reprinted in* 1994 U.S.C.C.A.N. 818.

centers and offices near airports for handling and sorting functions, public relations and marketing. Pet. App. 4a-5a; R.A. 186, 202, 280. Some airports, such as Honolulu's, are used as a hub for shipment to and from other countries. Under federal law, Lynden is an "air carrier." *See* 49 U.S.C. § 40102(a)(2); DHL Corp. v. C.A.B., 584 F.2d 914, 915 (9th Cir. 1978).

Believing that Hawaii could not legally impose excise tax on its gross receipts from the sale of such services, Lynden did not pay this tax. Pet. App. 5a. On May 19, 1997, Hawaii's Director of Taxation assessed Lynden more than a half million dollars for tax years 1987 through 1994. *Id* at 5a-6a. The tax was determined by attributing a portion of Lynden's gross receipts from the sale of its air delivery services to those parts of the service that were performed on the ground. *Id.* at 5a. Specifically, the portion of Lynden's receipts subjected to tax was determined by the following formula:

Total Worldwide		Hawaii Ground Costs
Revenue from	x	----------
Air Freight Sales		Total Worldwide Costs[3]

Id. Forty percent of the Hawaii ground costs included were the costs of the ancillary pickup and delivery of freight before and after flight; 60 percent of the ground costs included were sorting center costs, including labor for receiving, handling, and sorting air freight; and administrative, office, public relations and marketing expenses. R.A. 186, 192.

Proceedings below. Lynden complied with Hawaii's procedures for challenging the assessments. It paid the tax

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[3]Total worldwide costs included not only worldwide ground costs, but also the worldwide costs of hiring aircraft.

under protest and sought a refund in the Tax Appeal Court. Pet. App. 7a. Lynden challenged the tax as preempted, but agreed -- if these taxes were not preempted -- to accept the specific amount assessed. R.A. 186. On January 28, 1998, the Tax Appeal Court granted Lynden's motion for summary judgment, finding that the revenues taxed were "derived from the sale of 'air transportation'" and that therefore the tax "is preempted by 49 U.S.C. Section 40116." Pet. App. 7a, 19a.

The Director of Taxation appealed the tax court's decision to the Supreme Court of Hawaii, which reversed. The court concluded that the tax was not preempted because the tax was imposed on receipts attributed to activities -- although part of the air freight service Lynden provides -- that took place on the ground. *Id.* at 8a. In so ruling, the Supreme Court of Hawaii expressly relied on its decision a few weeks earlier, in *Director of Taxation of Hawaii v. United Parcel Service, Inc.*, 966 P.2d 648 (Haw. 1998) ("*UPS*"), upholding a parallel excise tax on the "ground" portion of UPS's gross receipts from the sale of its air freight services. Pet. App. 8a. The court held that Hawaii could tax these portions of air freight service receipts because the handling, sorting, marketing, pickup and delivery functions were not performed in an aircraft and, in the court's view, were therefore not "air transportation" within the meaning of defined by 49 U.S.C. §§ 40102(a)(5), (25), and their predecessors 49 U.S.C. §§ 1301(10), (21).[4] Pet. App. 4a n.2, 10a-15a. Although the court expressed concern because it believed the taxes were "measured as a proportion of gross receipts derived in part from the sale of 'air transportation,'" *id.* at 16a, the court erroneously concluded that this issue had not been presented. *Id.*; *but see* Lynden Answ. Br. in No. 21434

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[4]Sections 1301(10) and (21) were recodified as 49 U.S.C. § 40102(a)(5) and (25) in 1994, without substantive change. *See* n.2, *supra*.

(Supreme Court of Hawaii), at 9 (expressly arguing that a state tax measured as a proportion of gross receipts that includes receipts from air transportation is preempted).[5]

REASONS FOR GRANTING THE PETITION

Certiorari should be granted for three reasons. First, the decision below reflects a concerted and consistent effort to substantially narrow this Court's decision in *Aloha Airlines*, and additional guidance from this Court is needed. Although reasonably encompassed in this Court's interpretation of the governing law in *Aloha Airlines*, the precise questions at issue -- whether federal law permits states (and localities) to apportion gross receipts from the sale of air transportation for tax purposes, and if so, whether tax may be imposed on gross receipts allocated to any activity that occurs on the ground -- were not presented by the facts of that case and therefore were not expressly addressed. They are squarely and cleanly presented here.

Second, the questions are significant. If allowed to stand, the decision below can be expected to have a widespread effect on the air transportation industry and its customers, contrary to Congress' express goals. It will influence many states and

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[5]The court appears to have misconstrued Lynden's concession. Lynden had conceded that if the State were permitted to tax the activities on which it had imposed tax, and were permitted to measure that tax by attributing a portion of Lynden's gross receipts from air freight services, Lynden would not challenge the specific calculations regarding the *amount* of the tax. R.A. 186. Lynden did, however, consistently challenge the State's ability to impose any tax measured by such gross receipts, and its ability to impose taxes on the handling, sorting, marketing, pickup and delivery functions that are a necessary part of its, and all other air cargo companies', air transportation services. Answ. Br. at 8-19.

localities, which used to impose taxes on air transportation before *Aloha Airlines*, and other states and localities that would welcome the revenues, to impose an identical tax, or a profusion of different taxes, on an industry Congress intended to develop free of such burdens. Third, the decision below highlights a long-standing conflict with respect to the statutory definition of "interstate air transportation," 49 U.S.C. § 40102(a)(25), and its predecessor 49 U.S.C. § 1301(21), which, because it is a definition, affects the scope of many provisions of federal law.

The decision below provides an excellent vehicle for this Court to clarify the scope of the state tax preemption provision it addressed in *Aloha Airlines*. As this Court is well aware, restrictions on state tax authority can require express clarification following the Court's initial interpretation of governing law in order to secure compliance. *See, e.g., James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991); *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993); *Reich v. Collins*, 513 U.S. 106 (1994); *Newsweek, Inc. v. Florida Dep't of Revenue*, 118 S. Ct. 904 (1998) . The decision below also provides an opportunity for the Court to resolve the conflict as to the meaning of the statutory definition of "interstate air transportation," which affects a range of federal and state powers with respect to the air transportation industry.

I. THIS COURT'S GUIDANCE IS NEEDED TO ADDRESS THE SUBSTANTIAL TRUNCATION OF THE FEDERAL STATE TAX PREEMPTION PROVISION ADOPTED BELOW.

A. *Aloha Airlines*

The decision below unreasonably narrowed this Court's interpretation of the federal state tax preemption provision.

Section 1513, and its successor provision, prohibit states and localities from imposing a tax, "directly or indirectly," on "the sale of air transportation or on the gross receipts derived therefrom.. . ." 49 U.S.C. §1513.[6] In *Aloha Airlines*, this Court interpreted the scope of that provision. It found the provision was intended by Congress to prevent a proliferation of state and local taxes burdening interstate air transportation, 464 U.S. at 9, and that it preempted certain "state taxes, including gross receipts taxes imposed on the sale of air transportation." *Id.* at 12 n.6. Further, this Court noted that Congress had expressly declined to permit gross receipts taxes on sales of air transportation, *even if* limited to receipts fairly apportioned to the taxing state. *Id.* at 13 n.7. Thus, this Court found that the Hawaii excise tax at issue in that case, a tax on the Aloha and Hawaiian Airlines' gross income, was preempted and noted that its decision would likely invalidate a number of other states' taxes. *Id.* at 14 n.10.

Lower courts, including the Supreme Court of Hawaii, have understood *Aloha Airlines* to mean that taxes on *total* gross receipts from the sale of air transportation are preempted. *See, e.g.*, Pet. App. 16a, *City of College Park v. Atlantic S.E. Airlines, Inc.*, 391 S.E.2d 460 (Ga. Ct. App. 1990). And several lower courts have distinguished, and upheld, taxes on the gross receipts from services related to the air transportation industry, when *no* part of the receipts is from the sale of air transportation. *See, e.g., Travel Services, Inc. v. Government of the V.I.*, 904 F.2d 186 (3d Cir. 1990) (upholding gross

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[6]As recodified, the provision prohibits state and local taxes on, *inter alia*, "the sale of air transportation; or the gross receipts from that air . . . transportation." 49 U.S.C. §40116(b)(3)-(4). The phrase "directly or indirectly" was removed only because it was considered surplusage. 1994 U.S.C.C.A.N. at 1089 (H.R. Rep. No. 103-180).

receipts tax on travel agents' commissions from airlines); *Salem Trans. Co. v. Port Auth.*, 611 F. Supp. 254 (S.D.N.Y. 1985) (upholding gross receipts tax on limousine service for permission to solicit business at airports).

The question this Court did not expressly address in *Aloha Airlines* that Hawaii, among others, considered open after that decision, is whether states and localities may tax *some* of the gross receipts from the sale of air transportation, on the theory that some aspects of the service provided occur on the ground. *See also Airborne Freight Corp. v. New York Dep't of Taxation*, 527 N.Y.S.2d 107, 109 (App. Div. 1988) (declining to decide whether state may tax portion of gross receipts attributed to air freight company's pickup and delivery because state raised argument too late in the proceedings). This question is squarely presented by the decision below, which upheld a state tax on *some* of the gross receipts from the sale of air transportation, to the extent those receipts are attributed to activities performed on the ground.

Importantly, the resolution of the question by the court below potentially subjects a substantial portion of the gross receipts from both property and passenger air transportation to state and local taxes. This Court's guidance is urgently needed to prevent a result inconsistent with the statutory provision and with this Court's interpretation of that provision.

B. This Is Not An Isolated Error of Law.

Although this Court does not undertake to correct every misunderstanding of law, the decision below does not represent an isolated mistake and will not have a limited effect. To the contrary, it is part of a pattern by Hawaii's Director of Taxation to evade Congress' prohibition of state taxes on gross receipts

from the sale of air transportation. If permitted to stand, the decision will influence other states and localities to impose similar taxes -- carving an enormous hole in Congress' state and local tax preemption scheme.

1. *Hawaii*

As this Court knows, *Aloha Airlines* itself was a Hawaii case accepted for certiorari because the Supreme Court of Hawaii had upheld a tax imposed on the gross receipts of airlines, notwithstanding Congress' express preemption of such taxes. 464 U.S. at 12. The Hawaii court had upheld the tax on the theory that the legislature, by *deeming* it a "property" tax, had placed the tax on gross receipts beyond the preemptive reach of the federal provision. *In re Aloha Airlines*, 647 P.2d 263, 274 (Haw. 1982). Even after this Court reversed, and expressly found the tax preempted, 464 U.S. at 14 n.10, that tax provision was not repealed or amended by the state legislature, nor were regulations to limit its scope adopted by the Director of Taxation.

Instead, the Director of Taxation has engaged in a fifteen-year effort to carve loopholes out of *Aloha Airlines*, and has continued to enforce the specific provision this Court found preempted against air carriers under various theories. For example, the year after this Court decided *Aloha Airlines*, the Director of Taxation denied an air cargo carrier, UPS, refunds of the taxes it had paid on its gross receipts from sales of air freight transportation before the decision issued. *See UPS*, 966 P.2d at 650. Although this Court had held that the federal provision preempted "state and local taxes on gross receipts derived from air transportation *or* the carriage of persons in air commerce," *Aloha Airlines*, 464 U.S. at 14-15 (emphasis added), and although the facts in *Aloha Airlines* involved both,

id. at 10, the Director of Taxation apparently based its claim on this Court's more extensive discussion of the preemption question with respect to airline passengers.[7]

In addition, the Director assessed gross receipts taxes on air freight transportation against Air Polynesia (d/b/a/ DHL Cargo). *See Air Polynesia, Inc. v. Freitas*, 742 F.2d 546 (9th Cir. 1984) (explaining factual background but finding that the Tax Injunction Act deprived lower federal courts of jurisdiction over the question). Air Polynesia then successfully appealed the Director's assessments in state court. The Tax Appeal Court held that the tax was preempted. *See Air Polynesia, Inc. v. Director of Taxation*, Docket No. 2250 (Haw. Tax Appeal Court May 24, 1985).

Meanwhile, Hawaii's Director of Taxation also attempted to impose tax under the same provision against an air tour operator on the ground that inter-island sightseeing flights through federal airways were not "travel" or "transportation" within the meaning of the preemption provision. *In re Panorama Air Tour, Inc.*, Docket No. 1931 at 6-7 (Haw. Tax Appeal Court Nov. 27, 1984). This attempted loophole was rejected by the Tax Appeal Court. *Id.* at 8.

The Director's current claim -- that Hawaii is permitted to apportion gross receipts from the sale of air transportation and tax the portion attributed to activities that occur on the ground -- is simply the most recent in an unswerving assault on Congress' preemption of state and local taxes. The Director's imposition of tax on apportioned gross receipts was twice found

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[7]The decision below similarly describes *Aloha Airlines* as holding that it was improper for Hawaii to assess a tax on gross receipts derived from the carriage of *passengers*. *See* Pet. App. 10a.

preempted by Hawaii's Tax Appeal Court, *see* Pet. App. 18a; *UPS v. Director of Taxation*, Docket No. 2235 (Haw. Tax Appeal Court Jan. 13, 1997), but has now twice been upheld by the Supreme Court of Hawaii. *See* Pet. App. 2a; *UPS*, 966 P.2d at 339.

2. *Other states; other taxes*

If the decision below is permitted to stand, not only will Hawaii, and possibly local jurisdictions within Hawaii, tax apportioned gross receipts from the sale of air freight transportation, but other states and localities can also be expected to follow. Further, they might well be emboldened to intrude still further into the air transportation industry, reaching passenger transportation as well. Interstate air transportation will be subjected to precisely the proliferation of state and local taxes Congress sought, through preemption, to prevent as "inimical to the development of a national system." S. Rep. No. 93-12 (1973), *reprinted in* 1973 U.S.C.C.A.N. 1434, 1455.

At the time *Aloha Airlines* was heard, at least 11 states in addition to Hawaii had enacted gross receipts taxes on the sale of air transportation. *See Amicus* Br. of Alaska, *et al.*, *Aloha Airlines*, Statutory Appendix; *Aloha Airlines*, 464 U.S. at 13 n.7, 14 n.10.[8] Today, approximately sixty jurisdictions, state and local, impose some type of gross receipts tax, but forgo imposing the tax on air carriers, presumably in the (correct) belief that such taxes are precluded by Section 1513 and its

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[8] The eleven states were: Alaska, Arizona, Delaware, Indiana, Maryland, Mississippi, New York, Ohio, Oklahoma, Washington, West Virginia. Currently, at least five states impose some type of gross receipts or sales tax on transportation. *See* Ariz. Rev. Stat. § 43-5062; Del. Code. Ann., tit. 30, § 2301(d)(1); N.M. Stat. Ann. § 7-9-4 ; Okla. Stat. § 68-1354(C); Wash. Rev. Code § 82.16.020.

successor provision. *See* John T. Piper & Catherine A. Eggen, *Gross Receipt Taxes: General Principles*, Tax Management § 1610.03.A.2, § 1610.6101-05 (Worksheet 1) (BNA 1998). The decision below, if not reversed, would be a green light encouraging those jurisdictions, and others, to tax substantial portions of air carriers' gross receipts. Nothing in the reasoning below limits its applicability geographically or jurisdictionally. Any state or locality looking for revenues could feel free to tax these receipts. Indeed, such taxes might be a particularly attractive revenue source for the local, urban jurisdictions in which many airports are located, as a source of needed funding ultimately provided by shippers and travelers, many of whom are located -- and vote -- elsewhere.

It is not unrealistic to expect these states and localities to react in precisely this way, as it has happened before in closely related circumstances. After this Court's decision in *Evansville-Vanderburgh Airport Authority District et al. v. Delta Airlines, Inc. et al.*, 405 U.S. 707 (1972) (upholding a New Hampshire head tax on air travelers), state and local head taxes proliferated. By the following year, at least 31 jurisdictions had adopted such taxes and proposals were pending in many others, a result Congress found "predictable." 1973 U.S.C.C.A.N. at 1446, 1450 (S. Rep. No. 93-12). Indeed, it was this proliferation that led Congress to preempt state and local taxes on the sale of air transportation. *Id.*

The apportionment theory, adopted below, would permit taxation of substantial amounts of the gross receipts from sales of air transportation. Not only air freight forwarders, but also airlines, perform the pickup, delivery, handling, and sorting functions for air packages and air freight on the ground. Under the reasoning below, the costs of these activities by airlines could also be used to apportion gross receipts from the sale of

air cargo transportation and subject them to tax.

The reasoning is also applicable to passenger travel. At the very least, under the exact same theory, the cost of issuing tickets and boarding passes and checking, handling, and sorting baggage -- all functions that take place on the ground -- could be used to apportion gross receipts from the sale of passenger tickets and subject them to tax. Arguably, the reasoning could reach further. Another portion of passenger ticket prices is used to maintain and repair aircraft -- functions performed on the ground. The cleaning crews perform their work on the ground. The meals and drinks, although consumed in the air, are prepared and packaged on the ground. Similarly, the staff who load fuel perform their work on the ground.

Apportioning gross receipts based on where functions are performed -- without regard to how integral the functions are to the air transportation service sold -- subjects a substantial proportion of air transportation receipts to the very state and local taxes Congress intended to preempt.

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE DECISION BELOW IS INCONSISTENT WITH CONGRESS' UNDERSTANDING AND POSES A SIGNIFICANT THREAT TO CONGRESS' EXPRESS GOALS.

A. Hawaii's Designation of Sorting, Marketing, Pickup and Delivery Functions As Separate From Air Services Conflicts With Congress' Views and Those of Its Designated Agency.

Hawaii's claim that it may permissibly subject gross receipts from the sale of air freight services to state tax, to the

extent the receipts can be attributed to activities that occur on the ground, is based on the unexplained and incorrect premise that these ground-based activities are separate services, divisible from air services. That premise, however, is contrary to common sense, business experience, Congress' understanding, and the expertise of the agency entrusted by Congress to encourage the development of air transportation.

1. Air transportation services

No air delivery system operates without incidental ground activity. Before a package is sent by air, it is picked up, sorted, and delivered to the aircraft. These functions take place on the ground. Similarly, before a passenger can be flown to a destination, the passenger is sorted (issued a ticket and boarding pass and sent by foot or internal subway to the proper gateway) and delivered to the aircraft (by covered ramp, mobile lounge, or bus). In addition, the passenger's baggage is handled, sorted, and delivered to the aircraft. These incidental ground activities are not thought of by the air carrier or the customer as separate services. They are simply part of what is required to transport anything or anyone by air. No one would purchase the handling and sorting of a package by an air carrier if the package was not being sent by air. No one would contract with an air carrier to pickup the package and take it to the aircraft, or, after the aircraft landed, to deliver the package to its destination from the aircraft, if the package were not being sent by air. Similarly, passengers would not buy the service of being issued a ticket, or having their baggage handled, if they were not undertaking an air journey.

As the Ninth Circuit recognized with respect to the pickup and delivery services of another air freight company: "The trucking operations of [the company] are integral to its

operation as an air carrier. The trucking operations are not some separate business venture; they are part and parcel of the air delivery system." *Federal Express Corp. v. California Pub. Utils. Comm'n*, 936 F.2d 1075, 1078 (1991). Thus, Hawaii's apparent assumption that Lynden and others have simply combined two different sets of services and offered them as a package to customers has no basis and is plainly wrong.

2. Congress and its designated agency considered the ground activities at issue here integral to the provision of air transportation services.

In order to further its express goal of encouraging the development of an adequate, efficient, and economical air transportation system serving the air transportation needs of this country, Congress delegated the Civil Aeronautics Board ("C.A.B."), and later the Secretary of Transportation, to carry out its air transportation policies. *See Federal Express Corp.*, 936 F.2d at 1079; 49 U.S.C. § 1302 (1988); 49 U.S.C. § 40101. In particular, Congress wanted to encourage development of an all-cargo air transportation system that would be responsive to the present and future needs of shippers, commerce generally, and national defense. *See id.* Congress specified that the all-cargo air transportation system should be "an expedited" system and "an integrated transportation system." *Id.* Air freight transportation that takes a package or freight from the sender to its final destination is therefore exactly the kind of an expedited, integrated all-cargo air transportation system Congress expressly specified. 936 F.2d at 1079.

In order to ensure that its air transportation policies were implemented, Congress distinguished even among different federal agencies to consign the regulatory responsibility for ground pickup and delivery of air packages to the agency

regulating *air* transportation, rather than to its sister agency regulating motor transportation. Specific provisions removed jurisdiction for such ground pickup and delivery functions from the Interstate Commerce Commission ("ICC"), later the Surface Transportation Board. *See, e.g.*, 52 Stat. 1029 (1938), *codified as* 49 U.S.C. § 303(b)(7a) ("Nothing in this chapter . . . shall be construed to include . . . (7a) the transportation of persons or property by motor vehicle when incidental to transportation by aircraft . . . .") (limiting jurisdiction of the ICC). A parallel provision, originally enacted the same year -- 1938, granted jurisdiction over such ground pickups and deliveries to the agency regulating air transportation. *See, e.g.*, 49 U.S.C. § 1373(a) (1988) (granting the authority to approve air carrier tariffs for air transportation, including "services in connection with such air transportation").

The Civil Aeronautics Board, for decades the agency charged with implementing Congress' policies with respect to the economic regulation of air transportation, understood that its delegated powers included the economic regulation of pickups and deliveries of air packages and air freight. Initially, it enacted a regulation exerting regulatory authority over all such pickups and deliveries to and from an airport, using a 25-mile radius as a method for distinguishing *bona fide* pickups and deliveries, but considering special circumstances that warranted exceeding the rule of thumb measure. *See, e.g., Law Motor Freight, Inc. v. C.A.B.*, 364 F.2d 139, 140-41 (1st Cir. 1966); 29 Fed. Reg. 6276 (1964); 14 C.F.R. Pt. 222 (1980).

The C.A.B.'s conclusions, based on its expertise and obligations to implement congressional policy, were that:

> full development of air cargo transportation depends, *in large measure*, upon efficient *surface* transportation;

> effective customer-oriented pickup and delivery service can best be guaranteed when it is under the control of the direct air carrier or the air freight forwarder; this control can be maintained by the operation of trucks directly by the air carrier and the air freight forwarder or under contract with local cartage agents; and a reasonable amount of freedom for the direct air carriers and air freight forwarders to establish pickup and delivery services and to test their adequacy and economy is *vital* to prevent a stifling of the potential of air cargo transportation.

Law Motor Freight, 364 F.2d at 141 (quoting the Preamble to Part 222) (emphasis added). The C.A.B. determined to consider proposed tariffs for extensions beyond the rule of thumb measure "in light of whether the proposed service is truly air cargo pickup and delivery. . . ." *Id.* Thus, the C.A.B. recognized that ground pickup and delivery were part of air cargo transportation and that, to further Congress' goals, these needed to be regulated as air transportation.

When it chose to deregulate both air and motor transportation, Congress removed federal regulation of air cargo pickup and delivery altogether in favor of market regulation. The power to review tariffs for air cargo pickup and delivery by the agency charged with implementing Congress' air transportation policies was eliminated, but Congress retained a provision expressly withdrawing authority from the agency charged with implementing Congress' motor transportation policies. *See* 49 U.S.C. § 13506(a)(8)(B) (denying Secretary of Transportation and Surface Transportation Board any authority over "transportation of property . . . by motor vehicle as part of a continuous movement which, prior or subsequent to such part of the continuous movement, has been or will be transported by an air carrier"). In this way, Congress implemented its policy of

"relying on competitive market forces to decide the extent, variety, quality, and price of services provided" as the best method for developing an integrated air cargo transportation system. 49 U.S.C. § 40101(b)(2).[9]

The decision below, by treating ground pickups and deliveries -- as well as sorting, handling, marketing, etc. -- as separate from air transportation and subjecting them to the vagaries of state and local tax provisions, is not only inconsistent with Congress' and the Department of Transportation's long-standing view of air cargo service, but also undermines Congress' determination that the market should be the regulator most likely to achieve its goal of an expedited, integrated air cargo transportation system capable of serving this nation's needs. It cannot be gainsaid that taxation is a very potent form of regulation.

B. Hawaii's Imposition of Tax On Gross Receipts Attributed to Ground-Based Functions Integral to Providing Air Transportation Undermines Congress' Preemption Scheme.

Congress' preemption scheme was intended to protect this country's air transportation system from the "inequitable, and potentially chaotic burden of [state and local] taxation" on those who use air transportation, because of "the chaos which such local taxation works on the national air transportation system." 1973 U.S.C.C.A.N. at 1446 (S. Rep. No. 93-12). Congress explained that state and local tax "runs counter to the whole concept of uniformity . . . and the maintenance of a national air

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[9]The Department of Transportation continues to have and assert authority to regulate ground pickups and deliveries in the United States by foreign air carriers. 14 C.F.R. § 222.1-222.4.

transportation system." *Id.* at 1450.[10]

Indeed, Congress *rejected* a proposal to permit a tax similar to the one upheld below when it considered, and originally enacted, its state and local tax preemption provision. The proposal was urged by the deputy tax commissioner of Ohio, testifying at the House hearings that the then-proposed bill should be amended to permit state taxes on gross receipts that are "fairly apportioned to a State."[11] Such a tax would have had virtually the same effect on the air transportation system as the tax at issue here because most of the portion of the gross receipts of air transportation that can be fairly apportioned to a state is the portion attributed to the ground activities that take place within that state. Congress, however, did not adopt the proposal and enacted the provision preempting such a tax instead. *See Aloha Airlines*, 464 U.S. at 14 n.7; Ohio Op. Atty. Gen. No. 73-117 (Nov. 20, 1973).

The tax upheld below, and those sure to follow if the decision is not reversed, present the very evils inherent in state

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[10]With respect to air cargo, for example, state and local taxes interfere with adopting a uniform national pricing structure. If a regional or national air transportation provider passes the taxes onto customers in the jurisdictions that impose them, the provider must create different rate structures depending on where each package starts and ends its journey. Packages from the same customer would even be priced according to different rate structures if they were headed to different destinations. If the regional or national air transportation provider adopts uniform national rates anyway, customers in Idaho and Delaware would wind up paying a portion of Hawaii's tax. This is exactly the type of chaos and inequity Congress enacted the preemption provision to prevent.

[11]Hearings on H.R. 4082, H.R. 2695, H.R. 4214, H.R. 4182 and S.38 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 93d Cong. at 248-49 (1973).

and local taxation of gross receipts from the sale of air transportation services that led Congress to preempt it. A central concern Congress had, with respect to state or local taxes, was that there were no "safeguards to prevent undue or discriminatory taxation." 1973 U.S.C.C.A.N. at 1446. Congress has long premised the development of a vibrant air transportation system on, *inter alia*, preventing discrimination. *See, e.g.*, 49 U.S.C. § 1302(c) (adopting as a central policy, the promotion of service by air carriers "without unjust discrimination, undue preferences or advantages"); 49 U.S.C. § 40101(a)(4). With deregulation, it became even more important to prevent state discrimination between air transportation providers because that would distort the market Congress is relying on to ensure the development of an efficient, and responsive air transportation system. *See* 49 U.S.C. § 40101(a)(6). Congress' express goals with respect to air transportation recognize that the public interest is furthered by "avoiding unreasonable industry concentration" and "excessive market domination" by any one or group of air transportation providers, and by "encouraging entry into air transportation markets by new and existing air carriers and the continued strengthening of small air carriers to ensure a more effective and competitive airline industry." § 40101(a)(10), (13).

State and local taxes, as Congress noted when it chose to preempt them, pose significant threats to these goals. Hawaii's tax already provides an example. Hawaii has imposed its "attributed to ground activity" gross receipts tax on petitioner and on UPS. Hawaii has not, however, imposed this tax on any airline even though several airlines, such as United and Delta, provide identical services -- including door-to-door pickup and delivery, sorting and handling of air freight and packages at a ground facility, administration, and marketing. R.A. 186-87, 197-200, 207-08. Regardless of whether Hawaii chooses to

maintain this distinction in the future, the fact is that it -- and every other state and local jurisdiction -- *can* do so, and can impose differential taxation in many other ways as well. State and local tax schemes, as Congress explained, threaten "undue or discriminatory taxation." Undue and discriminatory taxation slow the development of air transportation and encourage inefficient investment and usage. Taxes like Hawaii's favor certain providers over others, promote industry concentration, and interfere with new entry -- undermining Congress' express goals with respect to preemption and the development of air transportation generally.

Another concern that prompted Congress to preempt state and local taxes is that a proliferation of taxes would directly affect the cost of air transportation and that this added cost could make air transportation "uneconomical" for some potential customers "and thus inhibit the growth of the air transportation system." 1973 U.S.C.C.A.N. at 1451. Hawaii's imposition of the tax on a significant "portion" of gross receipts from the sale of air transportation, rather than on all of the gross receipts, provides no protection against the negative impact on air transportation that Congress determined to avoid. The basis on which the court below upheld Hawaii's tax could be a basis for every state and every locality with an airport to impose taxes on substantial portions of the gross receipts collected from the sale of air transportation. Very quickly, such taxes could place air freight and air packages out of the reach of many customers. If applied to passenger services as well, such taxes could have the same effect on air travel.

In fact, by simply increasing their tax rates, state and local jurisdictions could raise the cost of air transportation as much by taxing a *portion* of such gross receipts as by taxing all of them at a lower tax rate. For example, consider a state that

wished to collect revenues of four percent of the gross receipts from the sale of air transportation, but was permitted to collect tax only on the gross receipts attributed to ground activities. If the percentage of gross receipts that can be attributed to ground activities is 25 percent, the state could nonetheless collect the total revenues it desires by raising its tax rate on those gross receipts to 16 percent.[12]

Congress also objected to any tax by any jurisdiction on the sale of air transportation that was not being used for airport development. Congress found it "inequitable" that a state or local jurisdiction might impose a tax "to gain financial windfalls," *i.e.*, raise revenues for the jurisdiction's "general fund." 1973 U.S.C.C.A.N. at 1446 (objecting to a Philadelphia tax for that reason). The tax upheld below is precisely the type of tax Congress found unacceptable: a tax on the sale of air transportation to fill the state's general coffers.

Thus, the decision below contravenes Congress' statutory provision and its express goals, with respect to air transportation generally and state and local taxation specifically. The tax it upheld undermines Congress' express goals with respect to preemption, competition, and the efficient development of a responsive air transportation industry, including expedited, integrated air cargo services, presenting the very evils Congress acted to prevent. No useful purpose is served by awaiting the "predictable" proliferation of other state

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[12]*I.e.*, assuming the total gross receipts from the sale of air transportation in the state is $100 million, 4% of the entire $100 million generates the same tax revenues as 16% of the $25 million of receipts attributed to ground activities -- $4 million. Some limitation on a state or local jurisdiction's power is imposed by the equal protection clause, but it is well-settled that states enjoy a considerable degree of latitude in making tax classifications. *See, e.g.*, *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973).

and local taxes, with the attendant damage they will cause, before deciding the question squarely and cleanly presented by the decision below. To the contrary, reviewing the decision below will permit the Court to clarify the scope of Congress' preemption provision and the scope of this Court's interpretation of that provision in *Aloha Airlines* in a significant factual context, relevant not only to Hawaii but to hundreds of state and local jurisdictions.

III. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A LONGSTANDING CONFLICT OVER THE SCOPE OF THE STATUTORY DEFINITION OF INTERSTATE AIR TRANSPORTATION.

The court below interpreted the statutory definition of "interstate air transportation" to include only carriage by aircraft, based on the initial part of the provision explaining that "'interstate air transportation' means the transportation of passengers or property by aircraft. . . ." 49 U.S.C. § 40102(a)(25).[13] At least one other court, and arguably more, appear to have reached a similar conclusion with respect to the meaning of the statutory definition of "interstate air transportation." *See, e.g., Salem Trans. Co.*, 611 F. Supp. at

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[13]The preemption provision before the court prohibits states and localities from imposing a tax on the sale of "air transportation" or on the gross receipts from such sales. 49 U.S.C. § 40116(b), *see also* 49 U.S.C. § 1513(a). "Air transportation" is defined as "foreign air transportation, interstate air transportation, or the transportation of mail by aircraft." 49 U.S.C. § 40102(a)(5); *see also* 49 U.S.C. § 1301(10). Thus, the statutory definition of "interstate air transportation" affects the scope of the preemption provision. The court below relied on its reading of that statutory definition to conclude that a gross receipts tax on the sale of air cargo transportation was not precluded to the extent those receipts could be attributed to activities that took place on the ground.

257; *but see also City and County of Denver v. Continental Air Lines, Inc.*, 712 F. Supp. 834 (D. Colo. 1989); *Airline Car Rental, Inc. v. Shreveport Airport Auth.*, 667 F. Supp. 293 (W.D. La. 1986).

In contrast, two federal courts of appeal have relied on language that appears later in the statutory definition to conclude that the scope of "interstate air transportation" is much broader. That language adds: "when *any part* of the transportation is by aircraft." 49 U.S.C. § 40102(a)(25) (emphasis added). The United States Court of Appeals for the D.C. Circuit was the first court to interpret the substantively identical predecessor provision, and undertook a detailed analysis of its text and layout.[14] The court concluded that the later phrase modified "carriage by aircraft" such that commercial transportation, any part of which was by aircraft, is included in the definition of "interstate air transportation." *See, e.g., City of Philadelphia v. C.A.B.*, 289 F.2d 770, 773-74 (D.C. Cir. 1961). The Tenth Circuit reached the same conclusion. *See Hill v. National Trans. Safety Bd.*, 886 F.2d 1275, 1280 n.6 (10th Cir. 1989) (noting that "goods, persons, or mail traveling 'partly by aircraft and partly by other forms of transportation' are within the scope of interstate, overseas, or foreign air commerce or air transportation, *see* 49 U.S.C. § 1301").[15]

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[14]The equivalent language in the earlier statute was: "whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation." 49 U.S.C. § 1301(21).

[15]*See also Federal Express Corp.*, 936 F.2d at 1079 n.1 (Singleton, dissenting) (interpreting the statutory definition of air transportation "to include goods carried in part by aircraft and in part by trucks" and relying on that definition to conclude, contrary to the majority, that Congress did not further preempt state regulation of goods carried exclusively by truck).

Furthermore, because the same language is used in the statutory definitions of "interstate air commerce," "foreign air transportation," and "foreign air commerce," the same interpretative issue also arises in cases where one of these parallel definitions is at issue. *See* 49 U.S.C. § 40102(a)(22), (23), (24); *Hill v. National Transportation Safety Board*, 886 F.2d at 1280 n.6. Thus, for example, a federal district court in Seattle interpreted "foreign air commerce" -- consistently with *City of Philadelphia* but inconsistently with the decision below -- as "including commerce which moves wholly by aircraft or partly by aircraft and partly by other forms of transportation from any place outside the United States to a place in the United States." *United States v. Petrykievicz*, 809 F. Supp. 794, 799 (W.D. Wash. 1992).[16]

The decision below squarely presents the question whether Congress' statutory definition of "interstate air transportation" includes both air and land segments of a continuous, integrated transportation service from origin to destination, or whether that definition includes only that portion of the transportation moved by aircraft. That same interpretive question also controls the scope of the statutory definitions of "interstate air commerce," "foreign air transportation," and "foreign air commerce." The conflicting interpretations reached by different courts is inconsistent with Congress' goal of a uniform, national

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[16]The Department of Transportation also appears to view the term "air transportation" as including any transportation part of which is by air, contrary to the decision below. Thus, the agency explains that its regulations with respect to foreign air carriers apply to "all *air* transportation of property that includes both air movement by a direct foreign air carrier and surface transportation to or from any point within the United States." 14 C.F.R. § 222.1 (emphasis added).

policy with respect to air transportation.

This Court's review is needed to resolve the conflict, which affects a considerable range of state and federal responsibilities. The cases cited above, for example, interpret these statutory definitions not only in the context of tax preemption cases, but also in a criminal case involving the carriage of explosives, a challenge to a federal authorization to provide air transportation, a challenge to state regulations imposed on air cargo delivery trucks, and a challenge to a federal agency pilot disciplinary decision. Many provisions rely on these statutory definitions in defining the Department of Transportation's responsibilities and authority. *See, e.g.*, 49 U.S.C. § 41712 (conferring authority on the Secretary of Transportation to investigate and prevent unfair and deceptive practices and unfair methods of competition in air transportation or the sale of air transportation). Thus, the Court's resolution of this question would have a substantial legal and practical impact.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 23, 1999

**Counsel of Record*

APPENDIX A

No. 21434

IN THE SUPREME COURT OF THE STATE OF HAWAII

In the Matter of the Tax Appeal of
RAY K. KAMIKAWA, DIRECTOR OF TAXATION, STATE OF HAWAII, Appellant,
v.
LYNDEN AIR FREIGHT, INC., Appellee.

NOTICE AND JUDGMENT ON APPEAL

TO THE HONORABLE PRESIDING JUDGE OF THE TAX APPEAL COURT:

PLEASE TAKE NOTICE the following Judgment on Appeal is entered this day by the Supreme Court of the State of Hawaii:

Pursuant to the Opinion of the Supreme Court of the State of Hawaii entered on November 25, 1998, the decision of the Tax Appeal Court granting Lynden Air Freight's motion for summary judgment and denying the Director of Taxation's motion for summary judgment is vacated, and this case is remanded with instructions to the Tax Appeal Court to enter summary judgment in favor of the Director of Taxation.

DATE: Honolulu, Hawaii, December 23, 1998.

BY THE COURT: L. Nakagawa, Clerk

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF HAWAII

In the Matter of the Tax Appeal of Ray K. KAMIKAWA, DIRECTOR OF TAXATION, STATE OF HAWAII, Appellant

v.

LYNDEN AIR FREIGHT, INC., a Washington corporation, Appellee.

No. 21434.

Appeal from the Tax Appeal Court November 25, 1998.

Before: MOON, C.J., KLEIN, LEVINSON, NAKAYAMA, AND RAMIL, JJ.

OPINION OF THE COURT BY MOON, C.J.

This appeal arises from the Tax Appeal Court's order granting appellee Lynden Air Freight, Inc.'s, [hereinafter, Lynden] motion for summary judgment and denying appellant Ray K. Kamikawa, Director of Taxation, State of Hawaii's [hereinafter, Kamikawa or the State] motion for summary judgment. This case presents the issue of whether the Federal Aviation Act (FAA), which regulates "air transportation,"

preempts Hawai`i Revised Statute (HRS) § 237-13(6) (1985)[1] Hawai`i's general excise tax statute -- as it applies to that portion of gross receipts that Lynden receives for the ground transportation and other non-air services of its freight forwarding business.

Specifically, Kamikawa contends on appeal that the Tax Appeal Court's order granting Lynden's motion for summary judgment, and denying his motion for summary judgment, should be reversed for the following reasons: (1) Hawai`i assessed general excise taxes on only that portion of Lynden's gross receipts that are properly allocated to the ground transportation and other non-air services of its freight forwarding business, and not on "air transportation" as defined by 49 U.S.C. § 40102 (1994); and (2) the Tax Appeal Court erred in concluding as a matter of law that, as applied, 49

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[1] HRS § 237-13 provides in relevant part:

> § 237-13 Imposition of tax. There is hereby levied and shall be assessed and collected annually privilege taxes against persons on account of their business and other activities in the State measured by the application of rates against values of products, gross proceeds of sales, or gross income, whichever is specified, as follows:
>
> . . . .
>
> (6)Tax on service business. Upon every person engaging or continuing within the State in any service business . . . there is likewise hereby levied and shall be assessed and collected a tax equal to four per cent of the gross income of any such business
>
> . . . .

Although the legislature amended this statute in 1992, no changes were made to the operative language of the provisions at issue in this case.

U.S.C. § 40116 (1994)[2] preempts Hawai`i from imposing general excise taxes on the portion of Lynden's revenues allocated to the ground transportation and other non-air services of its freight forwarding business.

Based on our recent decision in *In re Tax Appeal of Kamikawa v. United Parcel Service [(UPS)], Inc.*, 88 Hawai`i 336, ___, 966 P.2d 648, 650 (1998) (holding that 49 U.S.C. §§ 1301 and 1513 did *not* preempt HRS § 239-6, Hawai`i's Public Service Company tax statute, insofar as it applied to the gross receipts that UPS received for the ground transportation portion of packages that travel partly by air), we agree with Kamikawa's contentions on appeal. We, therefore, vacate the decision of the Tax Appeal Court and remand this case with instructions that the Tax Appeal Court enter summary judgment in favor of Kamikawa.

I. BACKGROUND

Lynden is a Washington corporation, headquartered in Seattle, Washington and registered to do business in Hawai`i. It is an air freight forwarder, providing door-to-door delivery of freight worldwide, including delivery within Hawai`i and between Hawai`i, the mainland United States, and other countries. Lynden delivers freight through independent airlines and motor carriers, which provide the actual aircraft transportation and ground transportation services.

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[2] In 1994, Congress recodified 49 U.S.C. §§ 1301 and 1513 as 49 U.S.C. §§ 40102 and 40116 respectively. Although the tax years at issue occurred both before and after recodification, Congress did not intend recodification to effect substantive changes. Thus, we refer only to the recodified versions of the statute.

Under these arrangements, third-party motor carriers pick up packages at the customer's location and deliver them to Lynden's warehouse. Lynden employees receive, handle, and sort the packages for particular flights and destinations. The packages are then transported to third-party airlines' freight facilities where they are loaded onto airplanes for delivery. This process is repeated, in reverse, once the packages arrive at airports local to the package recipients. Lynden charges customers for all service -- air transportation, ground transportation, and package handling -- on one bill.

Believing that Hawai`i could not legally assess general excise taxes on its freight forwarding business, Lynden paid no general excise taxes between 1986 and 1994. Based on the services Lynden provides in Hawai`i, however, the State issued final notices of assessment on May 19, 1997, in which it assessed general excise taxes on that portion of Lynden's gross receipts allocated to the ground transportation and other non-air services of its freight forwarding business for the years 1987 through 1994. The State assessed general excise taxes according to the following formula:

		Lynden's Hawai`i		Taxable
Lynden's Total	x	Ground Costs	=	Gross
Worldwide Revenue		Lynden's Total		Receipts
		Worldwide Costs		

The State used the above formula in an attempt to derive taxable gross receipts (*i.e.*, the portion of Lynden's gross receipts that are *not* derived from the sale of air transportation). The formula multiplies Lynden's worldwide total revenue by a fraction, the numerator of which represents the Hawai`i ground costs and the denominator of which represents Lynden's worldwide total costs.

The above-stated formula derives from HRS § 237-21 (1985), which provides in relevant part:

> § 237-21 **Apportionment.** If any person . . . is engaged in business both within and without the State . . . and if under the Constitution or laws of the United States the entire gross income of such person cannot be included in the measure of this tax, there shall be apportioned to the State and included in the measure of the tax that portion of the gross income which is derived from activities within the State, . . . *In other cases*, if and to the extent that the apportionment cannot be accurately made by separate accounting methods, *there shall be apportioned to the State and included in the measure of this tax that proportion of the total gross income, so requiring apportionment, which the cost of doing business within the State, applicable to the gross income, bears to the cost of doing business both within and without the State, applicable to gross income.*

(Emphasis added.)

Because Lynden is engaged in business within and without Hawai`i, the State used this formula to determine general excise taxes attributable to Lynden's Hawai`i-based activities. Further, by including only ground-related costs, the State attempts to avoid taxing the air service that Lynden provides to its customers. The resulting "taxable gross receipts" figure was then multiplied by the four-percent tax rate found in HRS § 237-13(6), yielding total assessments of $515,832.88 for the tax years in question. Believing that most of the assessment was preempted, Lynden disputed $500,595.28 of the total assessment; however, Lynden agreed by stipulation that, "if the State can tax a portion of Lynden's gross receipts it claims are

attributable to ground portions of the delivery service, the assessment of . . . $500,595.28 is correct."

After being assessed, Lynden paid the $515,832.88 assessment, but protested $500,595.28 of the general excise taxes, penalties, and interest and sought a refund in the Tax Appeal Court. On December 16, 1997, Lynden filed a motion for summary judgment, arguing that 49 U.S.C. § 40116 preempted Hawai`i's general excise tax statute, HRS § 237-13(6). At a January 13, 1998 hearing on Lynden's motion, the State orally moved for summary judgment and the Tax Appeal Court heard both Lynden's and the State's motions. On January 28, 1998, the Tax Appeal Court entered an order granting Lynden's motion for summary judgment and denying Kamikawa's cross-motion for summary judgment.

Following the entry of final judgment on February 19, 1998, Kamikawa timely appealed.

II. STANDARD OF REVIEW

This court reviews an award of summary judgment *de novo*, under the same standards applied by the trial court. *See Crompton v. Tern Corp.*, 83 Hawai`i 1, 6, 924 P.2d 169, 174 (1996). Therefore, "[s]ummary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact* and that the moving party is entitled to a judgment as a matter of law." *Id.* (emphasis and internal brackets in original) (citation omitted).

Moreover, it is well settled that, "in reviewing the decision and findings of the Tax Appeal Court, a presumption arises favoring its actions which should not be overturned without

good and sufficient reason. The appellant has the burden of showing that the decision of the Tax Appeal Court was 'clearly erroneous.'" *Weinberg v. City and County of Honolulu*, 82 Hawai`i 317, 322, 922 P.2d 371, 377 (1996) (citation omitted). Inasmuch as the facts here are undisputed and the sole question is one of law, we review the decision of the Tax Appeal Court "under the right/wrong standard." *Id.* (citation omitted); *Maile Sky Court Co., Ltd. v. City and County of Honolulu*, 85 Hawai`i 36, 39, 936 P.2d 672, 675 (1997) ("The interpretation of a statute is a question of law.").

III. DISCUSSION

The dispositive issue on appeal is whether the ground transportation and other non-air services that Lynden provides constitutes non-taxable "air transportation" under the FAA. We hold that it does not.

Based on our reasoning in *United Parcel Service*, we agree that the FAA preempts the State's ability to assess general excise taxes on revenues derived from the sale of "air transportation." *See United Parcel Service*, 88 Hawai`i at ___, 966 P.2d at 650-52. However, for the reasons discussed *infra*, we hold that the Tax Appeal Court erred when it concluded that "[t]he revenues received by Lnden [sic] Air Freight in the instant matter are derived from the sale of 'air transportation' as defined by 49 U.S.C. [§] 40102." Consequently, we hold that the State may assess general excise taxes on that portion of the gross receipts that Lynden receives for ground transportation and other non-air services it provides.

A. 49 U.S.C. § 40116 Preempts HRS § 237-13 Insofar As It Assesses General Excise Taxes On "Air Transportation."

Lynden relies on the United States Supreme Court's decision in *Aloha Airlines v. Director of Taxation*, 464 U.S. 7 (1983), for the proposition that the FAA, 49 U.S.C. § 40116(b),[3] preempts HRS § 237-13(6) insofar as it assesses general excise taxes on the gross receipts of Lynden's freight forwarding business, including receipts for ground and non-air service. Lynden's reliance on *Aloha Airlines*, however, is misplaced.

In *Aloha Airlines*, the Supreme Court addressed the issue of whether 49 U.S.C. § 1513(a), currently codified as section 40116(b), preempted HRS § 239-6 as it applied to the

---

[3] Section 40116 provides in relevant part:

§ 40116. State taxation

. . . .

(b) Prohibitions . . . . a State, a political subdivision of a State . . . may not levy or collect a tax, fee, head charge, or other charge on--

(1) an individual traveling in air commerce;
(2) the transportation of an individual traveling in air commerce;
(3) the sale of air transportation; or
(4) the gross receipts from that air commerce or transportation

. . . .

(e) Other allowable taxes and charges . . . . a State or political subdivision of a State may levy or collect --

(1) taxes (except those taxes enumerated in subsection (b) of this section), including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services. . . .

49 U.S.C. § 40116(b) (1994) (bold emphasis in original) (underscored emphases added).

gross income of airlines operating within the state. Aloha Airlines and Hawai`ian Airlines "sought refunds for taxes assessed under this provision for the *carriage of passengers* between 1974 and 1977; [and between 1974 and 1978, respectively]." *Id.* at 11 (emphasis added).

The Supreme Court concluded that section 1513(a) "proscribes the imposition of state and local taxes on *gross receipts derived from air transportation or the carriage of persons in air commerce.*" *Aloha Airlines*, 464 U.S. at 15 (emphasis added). Thus, the Court held that it was improper for Hawai`i to assess taxes on the gross receipts Aloha Airlines and Hawai`ian Airlines derived from the carriage of passengers.

In the present case, however, Kamikawa does *not* seek to assess taxes on the "air transportation" that Lynden contracts to provide to its customers. Rather, Kamikawa argues only that Lynden cannot escape Hawai`i's general excise tax on the gross receipts that Lynden receives for ground transportation and other non-air services. We agree with Kamikawa, as we did with his substantially similar contention in *United Parcel Service*, where UPS advanced arguments parallel to those advanced by Lynden here. We, therefore, reject Lynden's characterization of the present action as an attempt by Kamikawa to "unjustly force [] Lynden to litigate the same issue [raised in *Aloha Airlines*]." As explained *infra*, we hold that neither 49 U.S.C. § 40116(b) -- nor the Supreme Court's decision in *Aloha Airlines* -- bars the State's imposition of general excise taxes on the non-air portion of Lynden's freight forwarding business.

B. Lynden's Revenues In The Instant Matter Are Not Derived From The Sale Of Air Transportation.

This court has previously noted that "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." *Kawamata Farms, Inc. v. United Agri Prods.*, 86 Hawai'i 214, 232, 948 P.2d 1055, 1073 (1997) (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992)). Additionally, "[i]n all preemption cases, . . . we start with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

Based on these considerations and the express language of the FAA, we stated in *United Parcel Service*:

> Congress only clearly preempted the States' power to levy taxes on "the sale of air transportation or on the gross receipts derived therefrom." 49 U.S.C. § 1513(a) [recodified as § 40116]; *see also Aloha Airlines*, 464 U.S. at 15 (holding that section 1513(a) preempts State taxation of "gross receipts derived from air transportation or the carriage of persons in air commerce"). In the present case, [Taxpayer] seeks to avoid the imposition of taxes on the gross receipts that it receives for the ground transportation portion of freight that travels partly by air. Because we conclude that such gross receipts do not qualify as "the sale of air transportation or [] the gross receipts derived therefrom," we hold that 49 U.S.C. § 1513 does not prevent Kamikawa from assessing taxes under HRS § 239-6 on that portion of [Taxpayer]'s gross receipts.

United Parcel Service, 966 P.2d at 655.

As we held with respect to Hawai`i's Public Service Company (PSC) tax in *United Parcel Service*, the plain language of 49 U.S.C. § 40116 similarly does *not* preempt Hawai`i's general excise tax statute insofar as the general excise tax applies to gross receipts that are attributable to the ground transportation and other non-air services of Lynden's freight forwarding business. *Cf. Aloha Airlines*, 464 U.S. at 12.

In support of its contrary interpretation of section 40116, Lynden advances several of the arguments that UPS advanced -- and we rejected -- in United Parcel Service. We therefore restrict our discussion here to those arguments made by Lynden that differ from those previously addressed and rejected, although some overlap is unavoidable.

We first address Lynden's argument that the non-air services it provides are "a necessary and integral part of Lynden's air delivery system" and, as such, fall within the definition of "air transportation." Because nothing in the FAA's definition of "air transportation" supports Lynden's interpretation, we reject it.

The FAA defines "air transportation" to include "interstate air transportation," 49 U.S.C. § 40102(a)(5), which, in turn, is defined as follows:

> "Interstate air transportation" means the *transportation of* passengers or *property by aircraft*
>
> . . .
>
> (A) between a place in--
>
> (i) a State, territory, or possession of the

> United States and a place in the District of Columbia or another State, territory, or possession of the United States; [or]
> (ii) Hawai`i and another place in Hawai`i through the airspace over a place outside Hawai`i; [and] ...
> (B) *when any part of the transportation is by aircraft.*

49 U.S.C. § 40102(a)(25) (emphases added).

Based on the language quoted above, "interstate air transportation" applies *only* to transportation "by aircraft." However, in attempting to convince us that the ground transportation and non-air services it provides are "incidental" to its "air transportation," Lynden argues that it is an "air carrier" and charges its customers under a "single air waybill." As stated in *United Parcel Service*, a taxpayer's corporate structure is not dispositive of the service it provides. *See United Parcel Service*, 966 P.2d at 653 n. 6. Thus, whether or not Lynden is an "air carrier" has no impact on whether States may tax gross receipts that are *not* attributable to "the sale of air transportation." Moreover, Lynden's emphasis on the fact that "[t]he single fee [charged to customers] is reflected as one single item on the invoice as well as in Lynden's books and records" is irrelevant. The fact that "[t]he fee is not broken down into separate charges for the ground movement of the freight to and from the airplane and for the movement of the freight by airplane" in *no way* affects the State's power to assess taxes on the individual components of the service Lynden provides. If a company's internal billing practices could prevent a State's legitimate taxation of services, it would create havoc in the public treasuries of all fifty states. Moreover, even if we agreed with Lynden's proposition that the ground transportation and non-air services it provides are "incidental"

to its "air transportation," the language of the statute simply does not support Lynden's interpretation.

Lynden asserts that the FAA's preemption of State tax statutes, taxing "the sale of air transportation," applies to gross receipts derived from transactions where "any part of the transportation is by aircraft." 49 U.S.C. § 40102(a)(25)(B) (emphasis added). We rejected this very contention in *United Parcel Service*, stating:

> the structure of section [40102(a)(25)] . . . indicates that the "by aircraft" limitation applies throughout the definition . . . . The final clause; [which states "when any part of the transportation is by aircraft," merely] indicate[s] Congress' intent to give the Federal Aviation Agency jurisdiction over the 'air transportation' portions of interstate trips whether such trips occur wholly by aircraft, or partly by aircraft and partly by another type of transportation. In this way, the FAA includes intrastate transportation 'by aircraft' where the overall transportation involved is of an interstate nature. *United Parcel Service*, 966 P.2d at 652. Unlike Lynden's proffered interpretation, the above interpretation not only gives effect to the plain meaning of the "by aircraft" limitation, it does not lead to absurd results. Under Lynden's interpretation, where *any part* of the transportation occurs by air, the *entire* transaction falls within section 40102(a)(25)'s definition of "interstate air transportation" and, thus, within section 40116(b)'s preemptive reach. As we did in *United Parcel Service*, we reject such an unbridled reading of

the statute.[4]

Further, Lynden's position is not bolstered by Lynden's reliance on many of the same cases considered and distinguished in *United Parcel Service*. *See, e.g., City of Philadelphia v. Civil Aeronautics Board*, 289 F.2d 770 (D.C. Cir. 1961) (allowing freight forwarder to provide trucking service, as opposed to air service, based primarily on language specific to the Certificate issued by the Civil Aeronautics Board); *Federal Express Corp. v. California Public Utilities Comm'n*, 936 F.2d 1075 (9th Cir.1991), *cert. denied*, 504 U.S. 979 (1992) (holding that 49 U.S.C. § 1305 -- a broader preemption statute with very different language -- preempted state regulation of Federal Express, *including* its trucking services); *Airborne Freight Corp. v. Department of Taxation and Fin.*, 137 A.D.2d 30 527 N.Y.S.2d 107 (N.Y. App. Div. 1988) (expressly *refusing to decide* New York's argument that it could lawfully impose a tax "on the portion of plaintiffs' gross receipts representing their charges for service which do not involve air transportation"); *Air Polynesia, Inc. v. Dias*, No. 2250 at 2-3 (Haw. Tax App. Ct. May 24, 1985) (noting only that the taxpayer "carries property and mail by aircraft," the court did not discuss whether the taxpayer provided non-air transportation).

Finally, Lynden attacks the State's use of a "formula that

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[4] Because we believe that the language of 49 U.S.C. §§ 40116(b) and 40102(a)(25) is clear, Lynden's reliance on "other interpretive aids" is not persuasive. Thus, Lynden's foray into *other* statutory provisions removing from the Interstate Commerce Commission jurisdiction over "transportation of property . . . by motor vehicle as part of a continuous movement which, prior or subsequent to such part of the continuous movement, has been or will be transported by an air carrier[,]" *see* 49 U.S.C. § 13506(a)(8)(B) (1998), is neither helpful nor necessary.

multiplies a fraction (made up of Lynden's Hawai`i ground expenses as the numerator and Lynden's total expenses as the denominator) by Lynden's worldwide gross revenues." As previously stated, however, Lynden agreed by stipulation that, if 49 U.S.C. § 40116 did not bar the State from taxing of the ground transportation and other non-air services that Lynden provides, it would not challenge the assessment of $500,595.28. We do not, therefore, express an opinion regarding the correctness of the State's calculation by which it arrived at the disputed general excise tax assessment of $500,595.28.

Likewise, we do not consider whether the State correctly attributed receipts between the "air" and "non-air" services provided. However, if that issue were properly presented, we would be troubled by a calculation of general excise taxes that was measured as a proportion of gross receipts derived in part from the sale of "air transportation."

We feel compelled to reiterate that the State may *not* assess taxes against the gross receipts that Lynden, or any other taxpayer, derives from "the sale of air transportation." 49 U.S.C. § 40116(b). HRS § 237-13(6) empowers the State to assess general excise taxes of four percent on service businesses. HRS § 237-21 provides the formula by which the State apportions gross income between Hawai`i and other states in which taxpayers operate. We do not, however, read the language of HRS § 237-21 as requiring apportionment *only* with respect to Hawai`i versus non-Hawai`i activities, but also where, as here, other laws of the United States require apportionment on different grounds.

Specifically, Section 237-21 directs the State to "include[] in the measure of the tax *that portion of the gross income* which is derived from activities within the State, *to the*

extent that apportionment is required by the . . . laws of the United States." HRS § 237-21 (emphases added). Here, a "law [] of the United States," 49 U.S.C. § 40116(b), requires the State to measure gross income *excluding* gross receipts derived from the sale of "air transportation." That is, the State's calculation of general excise taxes must be based *exclusively* on revenues derived from the sale of "non-air" transportation and services.

Accordingly, we hold that the State may assess general excise taxes on only the gross receipts that Lynden receives for the ground transportation and other non-air services that Lynden provides.

IV. CONCLUSION

Because there is no genuine issue of material fact and the Tax Appeal Court erroneously interpreted the preemptive reach of 49 U.S.C. § 40116, we vacate the decision of the Tax Appeal Court granting Lynden's motion for summary judgment and denying Kamikawa's motion for summary judgment. We remand this case with instructions to the Tax Appeal Court to enter summary judgment in favor of Kamikawa, the Director of Taxation, State of Hawai'i.

APPENDIX C

IN THE TAX APPEAL COURT

STATE OF HAWAII

LYNDEN AIR FREIGHT, INC. **a Washington corporation**	**TAX APPEAL CASE NO. 97-0203** **(General Excise Tax)**
Plaintiff,	**ORDER**
v.	
RAY K. KAMIKAWA, DIRECTOR OF TAXATION, STATE OF HAWAII	**TRIAL DATE: January 13, 1998**
Defendant.	

ORDER

A notice of appeal was filed by Lynden Air Freight, Inc. on July 9, 1997. On December 16, 1997, Appellant Lynden Air Freight filed a Motion for Summary Judgment.

A hearing on these motions was held on January 13, 1998. The Appellant was represented by attorneys Milton M. Yasunaga and Roger Epstein. The Appellee was represented by Deputy Attorney General Josephine L. Chang.

Upon review of the motions, memorandums of law, affidavits, exhibits, oral arguments, and records in the file the court by a preponderance of the evidence finds that:

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. HRCP Rule 56(c). There are no disputed issues of material fact and only a question of law in the case at bar.

The legal question presented in this matter is whether the General Excise Tax, HRS Section 237-13, imposed upon the Appellant is preempted by Federal Statute 49 U.S.C. Section 40116.[1] All arguments relating to this question have been raised and addressed by way of written memorandum and oral argument.

In Aloha Airlines v. Director of Taxation of Hawaii, 464 U.S. 7 (1983), the United States supreme Court stated that 49 U.S.C. Section 1513(a) expressly preempts gross receipt taxes on the sale of air transportation.

The revenues received by Lynden Air Freight in the instant matter are derived from the sale of "air transportation" as defined by 49 U.S.C. Section 40102.[2] the General Excise Tax mandates that the tax be assessed against the gross income from the business. HRS Section 237-13. Therefore, the General Excise Tax is preempted by 49 U.S.C. Section 40116.

Accordingly, Appellant's motion for summary judgment

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[1] Formerly codified as 49 U.S.C. 1513.

[2] Formerly codified as 49 U.S.C. 1301.

is granted and the appellee's motion for summary judgment is denied. Counsel for the Appellant shall prepare and submit for the court's signature an appropriate final judgment within 10 days.

DATED: Honolulu, Hawai`i

January 28, 1998

_____

JAMES R. AIONA, JR.
Judge of the Above-Entitled Court

APPENDIX D

RELEVANT STATUTORY PROVISIONS

49 U.S.C. § 1301 (1988) - Definitions

As used in this chapter, unless the context otherwise requires: * * *

(21) "Interstate air transportation," "overseas air transportation," and "foreign air transportation," respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce' between, respectively--

> (a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia; —
>
> (b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and
>
> (c) a place in the United States and any place outside thereof; whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation;

whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

49 U.S.C. § 40102(a) - General Definitions

(25) "interstate air transportation" means the transportation of passengers or property by aircraft as a common carrier for compensation, or the transportation of mail by aircraft--

(A) between a place in--

(i) A State, territory, or possession of the United States and a place in the District of Columbia or another State, territory, or possession of the United States;

(ii) Hawaii and another place in Hawaii through the airspace over a place outside Hawaii;

(iii) the District of Columbia and another place in the District of Columbia; or

(iv) a territory or possession of the United States and another place in the same territory or possession; and

(B) when any part of the transportation is by aircraft.

49 U.S.C. § 1513 (1988) - State Taxation of Air Commerce

(a) Prohibition; exemption

No State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom;
* * *

49 U.S.C. § 40116 - State Taxation

* * *

(b) Prohibitions.--Except as provided in subsection (c) of this section and section 40117 of this title, a State, a political subdivision of a State, and any person that has purchased or leased an airport under section 47134 of this title, may not levy or collect a tax, fee, head charge, or other charge on--

(1) an individual traveling in air commerce;

(2) the transportation of an individual traveling in air commerce;

(3) the sale of air transportation; or

(4) the gross receipts from that air commerce or transportation.

(2)

Supreme Court, U.S.
FILED
MAR 22 1999
CLERK

No. 98-1359

In The

Supreme Court of the United States

October Term, 1998

LYNDEN AIR FREIGHT, INC.,

Petitioner,

v.

DIRECTOR OF TAXATION, STATE OF HAWAII,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

BRIEF OF *AMICUS CURIAE* CARGO AIRLINE ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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March 22, 1999

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16PP

QUESTIONS PRESENTED

1. Whether 49 U.S.C. § 40116(b) (and its predecessor, 49 U.S.C. § 1513(a)) preempts Hawaii Statutes H.R.S. § 237 and/or § 239 to the extent that these state statutes impose a tax on a portion of the gross receipts of an air carrier derived from the sale of air transportation.

2. Whether the definition of "interstate air transportation", 49 U.S.C. § 40102(a)(25) (and its predecessor, 49 U.S.C. § 1301(21)), includes ground services that are an integral element of the services provided.

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I. THE INTEREST OF THE CARGO AIRLINE ASSOCIATION

The Cargo Airline Association (hereinafter "the Association"), a nationwide organization made up of United States all-cargo air carriers, hereby files its *amicus curiae* brief in support of the Petition for a Writ of Certiorari filed in this matter by Petitioner, Lynden Air Freight, Inc. (hereinafter "Lynden").[1]

The Association, formed in 1948, currently represents those air carriers that provide integrated, door-to-door, expedited delivery of packages and freight throughout the world. Association membership includes virtually all U.S. all-cargo airlines and a number of other Associate Members, including airports with an interest in air freight development.

The tax at issue herein will have a direct impact on all Association members operating in Hawaii, and the ripple effect of the tax will impact operations nationwide as other jurisdictions move to impose similar schemes of taxation. Therefore, industry members will be acutely affected by the decision of this Court and have a substantial interest in this proceeding.

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[1] No party hereto authored this Brief in whole or in part, and no person or entity, other than the Cargo Airline Association, its members or its counsel, made any monetary contribution to the preparation or submission of this Brief. Written consent to the filing of this Brief has been obtained from all parties and evidence of such consent has been filed with the Clerk of this Court.

II. STATEMENT OF THE CASE

The Lynden Petition requests that this Court grant certiorari to review a decision of the Supreme Court of the State of Hawaii which held that a federal statute preempting State and Local taxation of gross receipts on the sale of air transportation, 49 U.S.C. § 40116[2], does not bar the State of Hawaii from taxing gross receipts from the sale of air transportation *to the extent that* such gross receipts can be attributed by the State to activities taking place on the ground, rather than in the air.

This Court has previously reviewed this preemption question in the case of *Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7 (1983), wherein it was held that the Hawaii excise tax on the gross receipts on the sale of air transportation was preempted by 49 U.S.C. § 1513, the predecessor of 49 U.S.C. § 40116. Nevertheless, the State of Hawaii has continued to impose a tax on the gross receipts from the sale of air transportation, at least to the extent that such receipts can be attributed by the State to activities taking place on the ground. Petitioner Lynden Air Freight, Inc. refused to pay the amounts claimed owing by the State of Hawaii and, on May 19, 1997, was assessed over $500,000 for the years 1987 through 1994. Lynden followed the procedures for contesting this assessment and, on January 28, 1998, the Hawaii Tax Appeal Court granted Lynden's Motion for Summary Judgment. The Director of Taxation appealed this ruling,

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[2] Formerly 49 U.S.C. § 1513. The recodification of this section was merely technical and not intended to make any substantive changes in the law. H.R. Rep. No. 103-180 (1993), *reprinted in* 1994 U.S.C.C.A.N. 818.

resulting in the decision by the Supreme Court of Hawaii at issue herein. *See Director of Taxation v. Lynden Air Freight, Inc.*, 968 P.2d 653 (Haw. 1998). The instant Petition requests review of this decision.

III. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED

A. INTRODUCTION

It is the position of the Cargo Airline Association that the decision of the Supreme Court of Hawaii is erroneous as a matter of law and, if left uncorrected, will have severe consequences on the air transportation of cargo within the United States. Indeed, the decision affects much more than the Petitioner or even the air freight forwarding industry. It impacts **all** providers of air transportation throughout the United States (not only in Hawaii) and is therefore potentially disruptive to the entire U.S. air transportation system. Permitting the decision of the Supreme Court of Hawaii to stand will encourage other jurisdictions to follow suit and will seriously undermine the ability of air cargo companies to provide needed services at an acceptable price. In addition, the Hawaii decision erodes the holdings of this Court in *Aloha Airlines*, 464 U.S. 7, and frustrates the will of the United States Congress, whose intent in enacting 49 U.S.C. § 40116 (and its predecessor, 49 U.S.C. § 1513), was to have a nationwide system of air transportation unfettered by myriad local taxes.[3] Only by granting the

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[3] *See* S. Rep. No. 93-12 (1973), *reprinted in* 1973 U.S.C.C.A.N. 1446.

Lynden Petition for Certiorari can these serious issues be addressed.

B. THE NATIONWIDE IMPACT ON INTERSTATE AIR TRANSPORTATION

The members of the Cargo Airline Association are companies that provide expedited, time-certain, transportation services to businesses and individuals throughout the United States and the world. Indeed, today's air cargo business provides such service to every address in the United States. Over the past twenty-five years, the all-cargo component of the air transportation industry represented by the Association has grown explosively in response to the needs of American business and individual shippers. Today, industry members[4] have annual revenues over $25 billion, employ over 400,000 full-time equivalent individuals and operate approximately 850 large jet aircraft and an equal number of small "feeder" aircraft enabling the smallest communities access to the world's economy.[5] The service provided has enabled businesses to remain competitive in a world-wide economy by relying on a system of Just-In-Time inventory control, made possible by the time-definite services provided by Association members and others in the marketplace.

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[4] The "industry" discussed, *infra*, includes only all-cargo aircraft and does not include the substantial amount of freight carried in the bellies of passenger aircraft.

[5] *See "The Economic Importance of the All-Cargo Air Carriers"*, prepared by Economists, Inc., Washington, D.C., July 1998.

As an element of the transportation provided, Association member companies supply all pickup and delivery functions integral to the movement of the freight. Shipper customers are billed for the entire journey from the initial pickup point to the ultimate delivery point; there is never a breakdown of the air and ground portions. Using a unique "hub-and-spoke" system, in which packages are picked up at a customer's door; transported by truck to an airport; flown to a hub where the packages are sorted by destination; flown by aircraft to a destination airport and then sorted and delivered by truck to the ultimate consignee, Association members are able to meet the most time-critical demands of American business. Many members of this industry are household names: Airborne, DHL, Federal Express and UPS. Some are less well known to the general public (BAX Global, Emery Worldwide and Kitty Hawk Aviation, for example), but provide the same integrated service to their shipper customers. These services are precisely what Congress envisioned when it enacted 49 U.S.C. § 40101 (formerly 49 U.S.C. § 1302), noting:

> . . . the Secretary of Transportation shall consider the following matters . . . as being in the public interest for all-cargo transportation:
>
> (1) encouraging and developing an expedited all-cargo air transportation system provided by private enterprise and responsive to –
>
> (A) the present and future needs of shippers;
>
> (B) the commerce of the United States; and

(C) the national defense.

(2) encouraging and developing an integrated transportation system relying on competitive market forces to decide the extent, variety, quality, and price of services provided.

And these services are precisely what the Ninth Circuit Court of Appeals recognized when it ruled that the trucking component of air transportation services is **not** a separate business, but rather is an integral part of "air transportation." *Federal Express Corp. v. California Public Utilities Commission*, 936 F.2d 1075 (9th Cir. 1991). In *Federal Express*, the Ninth Circuit found that:

> The trucking operations of Federal Express are integral to its operations as an air carrier. The trucking operations are not some separate business venture; they are part and parcel of the air delivery system. Every truck carries packages that are in interstate commerce by air. The use of the trucks depends on the conditions of air delivery. The timing of the trucks is meshed with the schedules of the planes. Federal Express owes some of its success to its effective use of trucking as part of its air carrier service.
>
> * * * * *
>
> Federal Express is exactly the kind of an expedited all-cargo service that Congress specified and the kind of integrated transportation system that was federally desired. Because it is an integrated system, it is a hybrid, an air carrier employing trucks. Those trucks do not destroy its status as an air carrier. They are an essential part of the all-cargo air service that Federal Express innovatively developed to meet the

> demands of an increasingly inter-linked nation. Congress has freed it from the constrictive grasp of economic regulation by the states.

Federal Express, 936 F.2d at 1078.[6]

The Hawaii decision at issue herein seriously threatens this national scheme and failure to take review raises the very real possibility of significant rate increases and pricing chaos, with varying State and Local taxation necessarily resulting in different prices for the same service in interstate air transportation – depending solely on where the ground portion of the movement is provided.

C. THE DECISION OF THE SUPREME COURT OF HAWAII UNDERMINES A CONGRESSIONALLY MANDATED SCHEME OF REGULATION AND A PRIOR OPINION OF THIS COURT

In order to ensure that a viable nationwide system of air transportation is maintained, and that a chaotic scheme of uncoordinated Regional and/or Local taxation does not cripple the needed nationwide service, Congress has specifically preempted certain activities. One of the activities preempted is the State or Local taxation of gross receipts from air transportation. *See* 49 U.S.C. § 40116. The question in this case is whether this statute applies to the taxes imposed by the State of Hawaii.

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[6] Although *Federal Express* dealt with a different preemption statute than that at issue herein (49 U.S.C. App. § 1305(a)(1), now 49 U.S.C. § 41713), the legal and policy principles are the same.

The language of 49 U.S.C. § 40116 is clear and unambiguous. It states that:

> . . . a State or political subdivision of a State may not levy or collect a tax, fee, head charge, or other charge on –
>
> (1) an individual traveling in air commerce;
>
> (2) the transportation of an individual traveling in air commerce;
>
> (3) **the sale of air transportation; or**
>
> (4) **the gross receipts from that air commerce or transportation.**

49 U.S.C. § 40116 (emphasis added).

The question remaining is whether a State may impose an excise tax on a portion of the sale of air transportation by segregating the "ground portion" of the movement. The grant of the Lynden Petition is necessary to resolve this important federal issue.

As noted above, this Court has already ruled on this issue – at least with respect to the application of a tax to an airline's entire gross receipts. *Aloha Airlines*, 464 U.S. 7. In that case, this Court noted that:

> . . . when a federal statute unambiguously forbids the States to impose a particular kind of tax on an industry affecting interstate commerce, courts need not look beyond the plain language of the federal statute to determine whether a state statute that imposes such a tax is preempted.

464 U.S. at 12. Therefore, the only issue now appears to be whether the slightly differing application of the tax in

this case mandates a different result from that reached in *Aloha*.

A review of the facts of this case leads to the conclusion that, while *Aloha* may be factually distinguishable from the instant case, it is legally identical. The State of Hawaii may not impose a gross receipts tax on the pickup and delivery portion of an air freight movement integral to the carriage of such freight by aircraft. Any other holding frustrates the intent of Congress in enacting 49 U.S.C. § 40116. For example, the legislative history of the preemption statute at issue herein specifically notes that State and Local taxation " . . . runs counter to the whole concept of uniformity . . . and the maintenance of a national air transportation system." 1973 U.S.C.C.A.N. at 1450. Failure to review and reverse of the decision of the Supreme Court of Hawaii in this proceeding will therefore seriously erode the system created by Congress and will narrow this Court's decision in the *Aloha* case.

The second issue raised by the Lynden Petition is simply whether the ground functions performed by an air carrier constitute "air transportation" and therefore cannot be legally severed from the integrated movement. We urge that, for the purpose of deciding whether the Hawaii excise tax is preempted by federal law, they **cannot** be so separated. Only by granting the Lynden Petition can this important principle of federal air transportation law be finally decided.

The Federal Aviation Act of 1958, as amended, 49 U.S.C. § 40101 *et seq.*, defines "air transportation" as "foreign air transportation, interstate air transportation, or the transportation of mail by aircraft." 49 U.S.C.

§ 40102 (a) (5). In turn, "interstate air transportation" is defined as:

> . . . the transportation of passengers **or property** by aircraft as a common carrier for compensation, or the transportation of mail by aircraft –
>
> . . .
>
> (B) when **any part** of the transportation is by aircraft.

49 U.S.C. § 40102 (a) (25) (emphasis added). No amount of semantic juggling by the Supreme Court of Hawaii can change the clear meaning of this language. The services provided by Petitioner, and all others similarly situated, must, for the purposes of analyzing the legality of the Hawaii tax, be considered "air transportation" from pickup to delivery – not merely from takeoff to landing. Any other finding ignores both the way in which cargo air transportation is provided and the specific language of 49 U.S.C. § 40102 (a) (25) which unambiguously provides that "air transportation" includes ground services when "any part" of the transportation is by aircraft. *See, e.g., City of Philadelphia v. Civil Aeronautics Board*, 289 F.2d 770, 773-74 (D.C. Cir. 1961).

Finally, if there were any doubt about Petitioner's status in the federal scheme of regulation, that doubt should be eliminated by the fact that Lynden, although operating no aircraft itself, is regulated as an air carrier under Part 296 of the Department of Transportation's Economic Regulations, 14 C.F.R. Part 296. Accordingly, 14 C.F.R § 296.3 (1998) specifically provides that:

> An indirect cargo air carrier is any U.S. citizen who undertakes to engage indirectly in air

> transportation of property, and uses for the whole **or any part of such transportation** the services of an air carrier or a foreign air carrier that directly engages in the operation of aircraft under a certificate, regulation, order, or permit issued by the Department of Transportation or the Civil Aeronautics Board, or the services of its agent, or of another indirect air carrier.

14 C.F.R. § 296.3 (emphasis added). *See also* 49 U.S.C. § 40102 (a)(2); *DHL Corp. v. Civil Aeronautics Board*, 584 F.2d 914, 915 (9th Cir. 1978). The import of this regulation, in the context of this proceeding, is that the entirety of the service performed by Petitioner is regulated by the Department of Transportation **as air transportation.** As such, it is rendered immune from State and Local taxation by 49 U.S.C. § 40116.

IV. CONCLUSION

The issues raised by Petitioner, Lynden Air Freight, in this proceeding are far-reaching and involve the entire movement of air freight in interstate commerce. Failure to grant review will necessarily result in a chaotic, crazy quilt, of State and Local taxes on air transportation services, which will undermine the federal system of aviation regulation in the United States. In addition, permitting the decision of the Supreme Court of Hawaii to stand will substantially narrow the prior finding of this Court in *Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7. Faced with these potential results, the Cargo Airline Association respectfully urges this Court to

grant the Petition for a Writ of Certiorari filed by Lynden Air Freight, Inc. on February 23, 1999.

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No. 98-1359

In The

Supreme Court of the United States

October Term, 1998

LYNDEN AIR FREIGHT, INC.,

Petitioner,

v.

DIRECTOR OF TAXATION, STATE OF HAWAII,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

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I. REASONS FOR DENYING THE WRIT

Petitioner taxpayer Lynden Air Freight attacks a plainly correct and reasonable decision – ruling that, for 49 U.S.C. § 40116 preemption purposes, ground transportation activities are not a part of "interstate air transportation" – by misstating the court's holding, and attempting to mislead this Court. Once the court's holding is correctly stated, it becomes unassailable, primarily because "interstate air transportation" is defined very clearly to include only transportation "by aircraft." Aside from this controlling plain language, the position urged by petitioner is not supported by the congressional intent, and would lead to absurd results. Finally, not only are there no cases directly conflicting with the Hawaii Supreme Court ruling, but all cases that have actually considered the preemption issue raised by this case *support* the Hawaii Supreme Court's decision.

A. Petitioner Critically Misstates the Holding of the Hawaii Supreme Court in a Specious Attempt to Denigrate the Court's Decision.

Petitioner seriously misstates the Hawaii Supreme Court's ruling in an attempt to mislead this Court. Petitioner wrongly claims the Hawaii Supreme Court ruling allows taxation of *air* transportation activities as long as the "functions [are] not performed in an aircraft," Pet. at 5, or "take place on the ground." Pet. at 1. The Hawaii Supreme Court never adopted such a position and petitioner's suggestion otherwise is a patent misrepresentation. Functions directly involved with air activities may very well fall within "interstate air transportation" *even*

though they occur on the ground – e.g., removal of cargo from plane, planning and scheduling the air flights, coordinating personnel to work the flight, cleaning of planes on ground, etc. All the Hawaii Supreme Court did was rule that activities that are properly associated with the ground *transportation* (and other non-air-related) portions of Lynden's delivery service[1] do not fall within "interstate air transportation," a ruling that, unlike the position petitioner falsely claims the Hawaii Court took, is unremarkable. It is *not* our position, nor the Hawaii Supreme Court's, that any activity that physically occurs on the ground is necessarily not "interstate air transportation." Activity that directly relates to the *air transportation* portions, even if it occurs on the ground, may very well be "interstate air transportation."[2] Activity, however, that relates to the *ground transportation* (or other *non-air-*

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[1] Examples would include trucking of packages to recipient destinations, removing packages from the trucks, and handing them over to particular recipients or to a pick-up counter.

[2] Similar erroneous statements about the Hawaii Supreme Court's holding or the issue presented in this case are made throughout the certiorari petition. *See, e.g.*, Pet. at 4 (inaccurately characterizing the tax as being applied to receipts from services *"performed on the ground"*); Pet. at 5 (wrongly stating Hawaii court found no preemption because the "tax was imposed on receipts attributed to activities . . . that *took place on the ground"*); Pet. at 6 (wrongly stating issue as "whether tax may be imposed on gross receipts allocated to any activity that *occurs on the ground"*); Pet. at 9 ("attributed to activities *performed on the ground."*); Pet. at 11 ("that *occur on the ground"*); at 14 (listing activities "that *take place on the ground"*); at 14-15 ("that *occur on the ground"*); Pet. at 24 n.13 ("activities that *took place on the ground"*).

related) portions of the delivery service is not "interstate air transportation." That is all the Hawaii court held.[3]

Taxpayer's position in this case, however, is that even activity directly involving the ground transportation (or other non-air-related) portions of the delivery service falls within "interstate air transportation," on the theory that it is all part of an overall air delivery service. As discussed in section B, infra, this position is clearly wrong and violates the plain language of the statute.

Contrary to taxpayer's assertion, the Hawaii Supreme Court did *not* "uph[o]ld a state tax on *some* of the gross receipts from the sale of air transportation." Pet. at 9. Instead, the Hawaii Court held that gross receipts from the ground transportation (or other non-air-related) activities of Lynden were simply *not* "air transportation," specifically, "interstate air transportation."[4]

It cannot be emphasized too much that the question of whether the particular apportionment of receipts between air transportation activities, and ground transportation (and other non-air-related) activities, was

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[3] Similarly, the "Hawaii Ground Costs" in the numerator of the formula, *see* Pet. at 4, only included ground costs relating to ground transportation (or other non-air-related) activities, not ground costs associated with air services. *See* Petitioner's Answering Brief (in Hawaii Supreme Court) at 4. As discussed later, infra at 3 - 5, the accuracy of the apportionment (including use of this formula) has never been challenged in this case.

[4] "Air transportation" is defined as "foreign air transportation, interstate air transportation, or the transportation of mail by aircraft." 49 U.S.C. § 40102(a)(5).

properly made in this case is *not* at issue in this Court.[5] In other words, whether certain receipts should be deemed to fall on the air transportation side of the line versus the ground transportation (or other non-air-related) side of the line is not before this Court. For petitioner stipulated in the trial court that "if the State can tax a portion of Lynden's gross receipts it claims are attributable to ground portions of the delivery service, the assessment of additional tax, penalties and interest of $500,595.28 is correct." Record on Appeal at 186 (Affidavit of Allen at paragraph 2). Thus, the only issue in this case is whether or not functions associated with the ground transportation (and other non-air-related) activities of Lynden can be taxed. This Court is *not* presented with the question of which particular functions fall on the ground transportation (or other non-air-related) activities side of the line, versus the air activities side of the line, or whether the amount of receipts taxed reflects the proper allocation. *See* discussion of taxpayer's position at page 3, supra.

Accordingly, petitioner's entire discussion pointing out ground activities that may indeed fall on the air side of the line, Pet. at 13-14, is irrelevant. If such activity does fall on the air side of the line, it should not be taxed. But Lynden, by its stipulation, has effectively conceded that the $500,595 in taxes at issue in this case is based upon

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[5] Nor was the apportionment at issue before the Hawaii Supreme Court. Pet. at 16a ("Likewise, we do not consider whether the State correctly attributed receipts between the 'air' and 'non-air' services provided.").

receipts from activities which fall on the ground transportation (or other non-air-related) side of the line,[6] and simply is arguing that such receipts nevertheless come within the "interstate air transportation" definition. In short, Lynden is claiming in its petition that *all* of its ground activities, even functions that are as far divorced from the air carriage part of its operations as imaginable – e.g., trucking package to recipient destination – are "interstate air transportation" because they are part of an overall delivery that includes air components. As demonstrated below, this position is wholly without merit.

B. Petitioner's Attempt to Include Ground Transportation within the "Interstate Air Transportation" Definition Violates the Plain Language of the Statute, Runs Counter to Congressional Intent, and Leads to Absurd Results.

It is important to note that taxpayer virtually completely avoids discussing the precise statutory language at issue in this case, instead relying upon nebulous, misleading, or irrelevant policy arguments. Taxpayer apparently recognizes that its position is in direct violation of the plain language of 49 U.S.C. § 40102(a)(25), which requires quite unambiguously that "interstate air transportation" be *"by aircraft."* Taxpayer argued below (and must be arguing to this Court, too, although it appears embarrassed to explicitly do so) that subsection (B)'s "when any part of the transportation is by aircraft" language sweeps up ground transportation, too.

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[6] It is undisputed, after all, that Lynden has not been taxed on the activities that all sides agree fall on the air side of the line.

The plain language of the definition of "interstate air transportation," however, shows that taxpayer's reading is wrong. By its express terms, "interstate air transportation" is defined in the body of the definition as transportation *"by aircraft."* There is simply no way, short of amending the English language, to include *ground* transportation within that very clear definitional phrase. Taxpayer has yet to come up with any argument to overcome this plain reading of the statute. Nothing in subsection (B) modifies the express requirement that the transportation included within the definition of "interstate air transportation" be *"by aircraft."*

The correct reading of the statute as a whole is: Subsection (A) includes transportation by aircraft that *by itself* consists of travel between the points provided therein (e.g., the aircraft flies from one state to another). The effect of the addition of subsection (B) – "when any part of the transportation is by aircraft" – is to extend the definition to cover *aircraft* segments that may not, by themselves, be *interstate,* but form a part of an *overall interstate* journey (which may include nonaircraft segments) "when any part of [that journey] is by aircraft." In short, subsection (B) allows the definition of "interstate air transportation" to encompass *intra*state flights that are part of an overall *inter*state trip. A simple example will suffice: If a package is flown from Los Angeles, CA, to San Francisco, CA, by air, and then taken by truck to Denver, CO, the flight to San Francisco, although purely intrastate, constitutes "interstate air transportation," because the overall trip is interstate (Los Angeles, *CA,* to Denver, *CO*). The truck portion from San Francisco to Denver, however, although interstate, is not "interstate

air transportation" because it is not "by aircraft," as the initial clause of the definition requires.

This interpretation of subsection (B) as modifying the *interstate* aspect of the definition, rather than the *by aircraft* aspect of the definition, is confirmed by the more careful language of the original version of the definition. The original version, 49 U.S.C. § 1301(21), which all sides agree was not intended to have been substantively changed by the recodification, Pet. at 5 n.4, reads:

> "Interstate air transportation" . . . mean[s] the carriage *by aircraft* of persons or property . . . *in commerce* between . . .
>
> > (a) a place in any State of the United States . . . and any place in any other State . . .
>
> *whether such commerce* moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

(emphasis added). As in the recodified version, the original version expressly defined "interstate air transportation" as "the carriage *by aircraft*." Significantly, Congress had initially included the phrases "in commerce" and "whether such commerce" that plainly referred to the overall interstate commerce defined in subsection (a). By including the words "whether such commerce" in the last clause, Congress made clear that the last clause was meant to clarify that the overall interstate flow of commerce required by subsection (a) may be wholly by aircraft, or partly by aircraft and partly by other forms of transportation. As a consequence, any "carriage by aircraft" (including an *intra*state flight) that constitutes a

part of an *overall inter*state trip is deemed to be "interstate air transportation."

In no event, however, was the last clause meant to eliminate the requirement that a transportation leg itself be "by aircraft" in order to fall within the definition of "interstate air transportation," as taxpayer erroneously contends. Indeed, to read the last clause the way taxpayer does would make the "by aircraft" language in the first clause of the definition completely superfluous. For if one reads the entire statute with the "when any part . . . " [or "whether such commerce . . . "] language construed to include ground or sea segments (as long as there is an air segment at some point) as taxpayer does, the presence of the "by aircraft" language in the initial part of the definition has no effect whatsoever. Such an interpretation making critical language superfluous must be rejected. *See Astoria Federal Savings & Loan v. Solimino*, 501 U.S. 104, 112 (1991).

Finally, taxpayer's construction leads to absurd results. For all types of non-air transportation, from rail and truck to boat, would all be defined as "interstate air transportation," as long as some small part of the overall interstate trip were by air. For example, if a package were sent by *truck* from Denver to San Jose, by *rail* from San Jose to San Francisco, by *ship* from San Francisco to Honolulu, and then flown to Maui, all of the trucking, rail and ship carriage would be "interstate *air* transportation" and fall within the preemption provision, even though the air segment was only a minor part of the overall voyage. Taxpayer's position is simply not plausible.

Because taxpayer cannot overcome both the plain language of the statute, as well as the absurd results its construction engenders, it tries in vain to assert policy arguments that simply do not apply or support its position. Underlying most of its argument is the premise that none of Lynden's ground activities, even if involving *ground transportation* (or other plainly non-air-related) matters, can be distinguished from its air transportation services, since even the purely ground transportation activities are "integral" to, or "incidental" to, its air transportation services. There is simply no statutory basis for such an interpretation. The definition of interstate air transportation as "transportation . . . by aircraft" simply does not allow for such a reading. The definition would have had to say "transportation by aircraft *or transportation by nonaircraft that is integral [or incidental] to the transportation by aircraft,*" or equivalent. It did not.[7]

Not surprisingly, taxpayer can cite no case law supporting such an "integral" theory applying to the definition of "interstate air transportation." Taxpayer's theory is also inherently flawed, as there is no reason to conclude that the ground transportation portions are integral to the air transportation portions, rather than the other way around. After all, the service provided by Lynden is essentially a complete delivery service, that utilizes, air, truck, and any other means of transportation to get a

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[7] Nor could the "when any part of the transportation is by aircraft" clause justify its "integral" theory, for that clause, even read as taxpayer wrongly reads it, could not be limited to only "integral" non-air transportation, but would have to cover nonintegral non-air transportation, as well.

package from shipper to recipient. Thus, it would be more accurate to say that the air services, and the ground services, are integral to the overall delivery service, rather than saying the ground services are integral to the air services, or vice-versa.[8]

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[8] Taxpayer confuses the simple issue presented in this case by discussing, Pet. at 16-19, the shift of jurisdictional control over "the transportation of persons or property by motor vehicle when incidental to transportation by aircraft," *away from the Interstate Commerce Commission* (later the Surface Transportation Board), *see* 49 U.S.C. § 303(b)(7a) [rephrased and now codified at 49 U.S.C. § 13506(a)(8)(B)], and *to the Civil Aeronautics Board (CAB)* (later, the Secretary of Transportation). It was 49 U.S.C. App. § 1373(a) that formerly gave the CAB authority over "services *in connection with* . . . air transportation." *See Law Motor Freight, Inc. v. C.A.B.*, 364 F.2d 139, 140 & n.2 (1st Cir. 1966). But this shift of jurisdictional authority from ICC to CAB, for whatever else it may mean, does *not* mean that the definition of "interstate air transportation," *the only relevant definition in this case*, was ever expanded to include "services in connection with . . . air transportation." Rather, only carriage "by aircraft" was included.

Indeed, if "interstate air transportation" included "services in connection with . . . air transportation," there would have been no need for 49 U.S.C. App. § 1373(a) to *extend* CAB jurisdiction to such services, as the CAB (now Secretary of Transportation) always had jurisdiction over "interstate air transportation." *See, e.g.*, 49 U.S.C. § 41101 (requiring an air carrier to hold a certificate before providing "air transportation").

It is noted that as part of the deregulation of domestic rates under the Airline Deregulation Act, § 1373(a) was amended to no longer apply to *interstate* air matters. *See* 49 U.S.C.A. § 41504 (Historical and Statutory Notes, at 217-218). Because it still applies, however, to "practices *related to* . . . foreign air transportation," 49 U.S.C. § 41504(a)(1)(A), the Department of Transportation does have authority over some incidental (to

Taxpayer's claim that allowing states to tax the ground transportation portions of delivery services that include air components would somehow defeat Congress' goal in enacting the preemption provision is baseless. Pet. at 19-24. To suggest that taxation of ground transportation activities somehow imposes an impermissible burden on air transportation activities simply because delivery companies often combine the two is unjustified. Taxing ground transportation functions burdens the ground transportation functions, but it does not, by definition, burden the air transportation functions; only a tax *on the air transportation* could do that. This is common sense.

If a company chooses to combine ground transportation functions with air transportation services in order to provide a complete shipper to recipient service, it should not be allowed to claim that a tax on the ground transportation impermissibly burdens the air activities, which are separate and distinct untaxed activities. If Congress had meant to exempt all ground transportation functions from state taxation when they were tied or connected in some

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foreign air transportation) ground activity. That explains 14 C.F.R. § 222.1, giving the Department control over certain surface transportation (including, e.g., ground transportation) within 35 miles of an airport (*see* 14 C.F.R. § 222.2). Contrary to Lynden's assertion, Pet. at 26 n.16, however, Section 222.1, while not carefully worded, was *not* intended to define "air transportation" (specifically, "foreign air transportation") as including surface transportation, but simply implemented the Department's control over such surface transportation pursuant to its authority over "practices *related to* . . . foreign air transportation." 49 U.S.C. § 41504(a)(1)(A). In short, the surface transportation discussed *"related to"* "foreign air transportation," but was *not* "foreign air transportation."

way to air transportation functions, it could easily have done so, as in the hypothetical definition given on page 9, supra. It did not do so.[9] Taxpayer merely asserts, but can point to nothing suggesting Congress believed state taxes on ground transportation activities were harmful to development of a national air transportation system. Indeed, to the contrary, "[t]he legislative history is replete with references to *air* travelers, *air* passengers and *air* transportation." *Salem Transportation Co. v. Port Authority*, 611 F. Supp. 254, 257 (S.D.N.Y. 1985) (emphasis in original); *see, e.g.*, 1973 U.S.C.C.A.N. at 1434-35, 1449-51.

Taxpayer's suggestion that a state could evade the ban on air taxes by simply jacking up the ground transportation taxes, Pet. at 22-23, misses the point. A state that did so would end up deterring *ground transportation*, not air transportation. Indeed, a state that did so would actually *encourage* more complete *air* transportation – i.e., packages being delivered via a route that uses as little ground transportation as possible – because the air portions remain untaxed while the ground portions would become prohibitively expensive. Congress' goal, after all, was *not* to prevent states from raising the same revenue through ground taxes, it was to prevent states from

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[9] Taxpayer is simply wrong in suggesting that Congress, when it rejected an Ohio proposal, rejected a tax like the one upheld below. Pet. at 20. The Ohio proposal permitted taxes upon *air* transportation gross receipts "fairly apportioned to a State," and thus could have allowed a state to tax, for example, in-state removal of cargo from an airplane. The Hawaii tax, on the contrary, is not applied to *air* transportation activities at all, even if apportionable to Hawaii, but is applied only to ground transportation (and other non-air-related) functions.

taxing air transportation. A hiked-up ground tax, as long as it is imposed only on ground transportation (or other non-air-related) activities,[10] does not tax nor deter air transportation.

In short, taxpayer's entire policy argument begs the question: taxpayer simply *assumes* that a tax on Lynden's ground transportation *is* a tax on air transportation, and thus improperly burdens air transportation. The problem is that petitioner makes no viable argument to show that a tax on Lynden's ground transportation is a tax on air transportation. As discussed earlier, a tax on ground transportation is *not* a tax on air transportation because it is a tax on activity that is *not* "by aircraft."[11]

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[10] To be sure, a tax on ground transportation that were levied at a higher rate *only* when the ground transportation was connected to air transportation (and at a lower rate when not so connected) would discriminate against air transportation. Hawaii, of course, imposes no such discriminatory tax.

[11] Taxpayer's claim that a state tax on ground transportation would "interfere with adopting a uniform national pricing structure," Pet. at 20 n.10, because of potentially differing taxes from state to state, is without merit. First, petitioner cites nothing to support the notion that a "uniform national pricing structure" motivated the preemption provision. Second, even assuming uniform pricing were a goal, as discussed above, the differing tax would be imposed on *ground* transportation, not air transportation, and thus would not affect uniform pricing of the *air portions* of delivery services, *air* matters being Congress' only focus. Third, differing state taxes affect the uniformity of prices of complete shipper to recipient services (including both ground and air components) no more so than differing (from state to state) costs of all sorts, e.g., differing gasoline prices, truck repair costs, etc. Finally, it is hardly remarkable that packages shipped from and to different locations might be priced differently.

Furthermore, a key and critical purpose behind the preemption of state taxes on air transportation was Congress' desire to avoid the *double* taxation that would result if states as well as the Federal government taxed air transportation.

> This Committee never intended that air travelers would be subject to state and local head taxes as well as to national user charges. . . . [S]tate and local head taxes constitute an inequitable, double burden of taxation on air passengers.
>
> . . . .
>
> . . . Air passengers are already being charged sufficiently at the Federal level through an 8 percent user charge on domestic tickets and $3 per person on international tickets, and it is not necessary to place a double burden on them.

Senate Report No. 93-12, 93rd Cong., 1st Sess. (1973), reprinted in 1973 U.S.C.C.A.N. 1434, 1450; *see also Aloha Airlines, Inc. v. Director of Taxation,* 464 U.S. 7, 9 (1983) (major concern was "double taxation"); *Salem Transportation,* 611 F. Supp. at 257 (same). It is clear *and undisputed,* however, that the ground transportation portions of Lynden's business are not subject to the federal government's air tax. That tax is imposed by 26 U.S.C. § 4271 upon "taxable transportation," which is defined by 26 U.S.C. § 4272 to mean "transportation *by air* which begins and ends in the United States." Thus, because no federal air tax is imposed upon Lynden's ground transportation

activities (a fact Lynden has never disputed),[12] Hawaii's tax on that activity would obviously not impose the *double* taxation Congress sought to avoid.

For this additional reason, too, the Hawaii Supreme Court was correct in holding that Hawaii's tax on Lynden's ground transportation activities is not preempted.

Because the Hawaii Supreme Court's decision was so plainly correct, certiorari would simply waste this Court's time.

C. Not only are there No Decisions that Present a True Conflict with the Hawaii Supreme Court Decision, but All the Courts that Have Considered the Preemption Issue Support the Decision of the Hawaii Supreme Court.

The centerpiece of petitioner's search for a conflicting decision, *City of Philadelphia v. Civil Aeronautics Board*, 289 F.2d 770 (D.C. Cir. 1961), does *not* actually present a conflict with the Hawaii Supreme Court's decision. First, that case was plainly not a preemption case at all, and thus could not raise a true conflict with the Hawaii decision below. Even if the D.C. court adopted a definition of

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[12] Moreover, because Lynden is a *freight forwarder*, who does not perform the ground or air carriage transportation itself, it is not subject to the federal air tax for that additional reason. *See* 26 C.F.R. § 49.4271-1 ("the tax imposed by section 4271 . . . applies to amounts paid to an air carrier by a freight forwarder . . . for the transportation of property by air. *The tax does not apply to amounts paid* by a shipper *to a freight forwarder*. . . . ").

"interstate air transportation" that conflicts with the definition supplied by the Hawaii court – which, as demonstrated below, is *not* the case – because the D.C. court undeniably did *not* hold that a state tax on the trucking leg would be preempted, there is no actual conflict with the Hawaii decision finding no such preemption. This is especially true because the *City of Philadelphia* case, by not being a preemption case, was not subject to the more rigorous standard for finding preemption of state taxing authority. *See Dep't of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332, 345 (1994) (preemption of state taxing authority may only be found when it is "the *clear and manifest* purpose of Congress"); *California State Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844, 851-52 (1989) ("court must proceed carefully when asked to recognize an exemption from state taxation that Congress has not *clearly* expressed").

Second, putting aside the non-preemption nature of the *City of Philadelphia* case, which alone eliminates any true conflict, that case did *not* clearly adopt a definition of "interstate air transportation" that differs from the one adopted by the Hawaii court below. Contrary to petitioner's assertion (Pet. at 25), the court never expressly ruled that the trucking leg *itself* was "interstate air transportation." Rather, the court simply held that the fact that a portion of the overall trip was by non-air means (specifically, by truck), did not prevent the entire trip from being amenable to the "interstate air transportation" definition. 289 F.2d at 773 (rejecting notion that "truck service . . . prevents the *transcontinental* service . . . from being properly described as 'air transportation.' "). In

short, the *air* leg portion (California-Newark) could indeed be "interstate air transportation" despite the presence of the Philadelphia-Newark truck leg. But the court did *not* specifically rule that the truck leg was *itself* "interstate air transportation."[13] (And it is undisputed that the court did not rule the truck leg was "interstate air transportation" *for the purpose of preempting any state tax thereupon*.).

The only other Court of Appeals case petitioner asserts is in conflict with the Hawaii Supreme Court's decision is *Hill v. National Transp. Safety Bd.*, 886 F.2d 1275, 1280 n.6 (10th Cir. 1989), which contained a gratuitous statement in a footnote. First, the statement, besides being *wholly conclusory* with absolutely no supporting analysis, is only *dicta*. It thus cannot raise a genuine conflict worthy of this Court's attention. Second, as with the *City of Philadelphia* case, *Hill* was *not* a preemption case, and thus did not involve the more rigorous standard that must be met before finding preemption of a state tax. *See ACF Industries, Sierra Summit*, supra. *Hill* simply (and indisputedly) does *not* hold that a state tax on the ground transportation of property – even if ultimately linked to an air component – is preempted. Therefore, *Hill* plainly does not present a true conflict warranting this Court's certiorari jurisdiction.[14]

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[13] Nor was it necessary to make such a specific ruling, since all the court needed to do was fit the *overall* trip into a vague CAB certificate authorizing "air transportation."

[14] Petitioner's citation of *United States v. Petrykievicz*, 809 F. Supp. 794, 799 (W.D. Wash. 1992), does not create a sufficient conflict for many reasons. First, it is only a district court case, *see* Supreme Court Rule 10(b) (conflict must be with Court of

Petitioner has conceded, as it must, that there is no case holding a state tax on ground transportation activities to be preempted even though the ground transportation is connected, integrally or not, to air components. Moreover, petitioner cannot cite even a single case that unambiguously and in non-conclusory fashion adopts a definition of "interstate air transportation" that includes ground transportation, let alone one that does so in the preemption context. In short, there are no cases definitively addressing the issue in this case that support petitioner.[15]

Appeals decision); second, it is not a preemption case; and third, it deals with the different definition of "foreign air commerce." Moreover, the decision is essentially conclusory.

[15] Petitioner's reference to the *dissenting* opinion in *Federal Express Corp. v. California Pub. Util. Comm'n*, 936 F.2d at 1079 n.1, speaks for itself. Pet. at 25 n.15. Not only was the statement made on the losing side of a decision, the statement was not even clearly the opinion of the dissenting judge, but rather simply the judge's characterization of what one party was arguing. Moreover, even if the judge were taking a position, it was plainly dicta, as the judge was arguing that goods *never* transported at any point by air were not within any possible preemption. There was thus no need to resolve the question of whether goods being transported by truck, but which at some previous or subsequent time are transported by air, fall within a preemption provision.

It is important to note that the *Federal Express* case is, in fact, completely irrelevant to the case at bar because it *dealt with an entirely different preemption provision*, 49 U.S.C. § 1305, preempting laws "relating to rates, routes or services of any air carrier." *See In re Tax Appeal of Ray K. Kamikawa v. United Parcel Service*, 88 Haw. 336, 343, 966 P.2d 648, 655 (1998). This is a much broader provision than the preemption provision at bar, both because of the "relating to" language, and because it covers *all*

The only cases that actually do address the *preemption* question raised by this case all support the Hawaii Supreme Court's decision. In *In re Dave's Motor Transportation, Inc.*, No. TSB-D-90(3)C, 1990 N.Y. Tax LEXIS 100 (N.Y. Tax Appeals Trib. Mar. 22, 1990), the New York Tax Appeals Tribunal held that despite the fact Dave's Motor engaged in "the pickup and delivery of air cargo transported by airlines" at airports, did so in containers owned by American Airlines, in trucks which bore the "AA" insignia, and the air freight "moved under a single airway bill of lading for a single charge which covered the entire ground-air movement," New York's tax on Dave's Motor was *not* preempted. The Tribunal ruled that 49 U.S.C. § 1513 preempted "only air transportation and air commerce *by aircraft* and *not other forms of service or transportation which may affect air transportation* or air commerce by aircraft." *Id.* at LEXIS *12 (emphasis added).

Similarly, the United States Court of Appeals for the Ninth Circuit held that a fee charged on the gross receipts a rental car company generated from airport passengers was *not* preempted despite the fact the company serviced persons who had traveled by air, because "§ 1513(a) does not prohibit fees on ground transportation service." *Alamo Rent-A-Car v. City of Palm Springs*, 955 F.2d 30, 31 n.1 (9th Cir. 1992) (per curiam); *see also Airline Car Rental v. Shreveport Airport Authority*, 667 F. Supp. 293, 298-99 (W.D. La. 1986) (same). "Nothing in the text or legislative history of § 1513(a) suggests that it was intended to have

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services of any air carrier, not just "interstate air transportation," which is very narrowly defined to include only transportation "by aircraft." *Cf. id.*

any applicability to fees on ground transportation service." *Alamo*, 955 F.2d at 31 n.1.

Finally, the court in *Salem Transportation*, 611 F. Supp. 254 (S.D.N.Y. 1985), rejected preemption of a fee on the ground transportation of passengers who have traveled or will travel by aircraft, stating:

> There is no evidence that congress intended that § 1513(a) would include a prohibition of fees on ground transportation service. Section 1513(a) was intended to include only air transportation . . . *by aircraft* and *not other forms of service or transportation which may affect air transportation* . . . by aircraft.

611 F. Supp. at 257 (emphasis in original).

In sum, all of the cases that actually address the *preemption* question *support* the Hawaii Supreme Court's position. There is not a single preemption decision to the contrary. Accordingly, certiorari should be denied.

* * *

Contrary to taxpayer's characterization, Pet. at 10-11, Hawaii's Director of Taxation is not attempting to carve exceptions out of this Court's decision in *Aloha Airlines v. Director of Taxation*, 464 U.S. 7 (1983),[16] but is simply

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[16] Taxpayer's suggestion that the Director or the Hawaii Supreme Court naively distinguished *Aloha* because it dealt only with *passengers*, not *cargo*, Pet. at 10-11 & n.7, is patently frivolous. The Hawaii Supreme Court (and the Director) distinguished *Aloha* because it dealt with taxes on the carriage of things *by air*, whereas this case is about taxation of *ground* transportation (and other non-air-related) activities. *Lynden*, 89 Haw. 51, 55, 968 P.2d 653, 657 (Pet. at 10a).

ensuring that corporations do not improperly enlarge *Aloha* to cover *ground transportation* activities that are plainly not "by aircraft." At the very least, Congress did not "clearly" or "manifestly" demonstrate an intent to preempt taxes on such ground transportation functions.

II. CONCLUSION

Because the "interstate air transportation" definition clearly and unambiguously requires that the transportation be "by aircraft," because petitioner's contrary conclusion would lead to absurd results, and because there are no cases that directly conflict with the Hawaii Supreme Court ruling – indeed, all preemption cases on point support the decision – certiorari should be denied.

DATED: Honolulu, Hawaii, March 25, 1999.

Respectfully submitted,

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No. 98-1359

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

LYNDEN AIR FREIGHT, INC.,
Petitioner,
v.
DIRECTOR OF TAXATION, STATE OF HAWAII,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Hawaii

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BRIEF AS *AMICUS CURIAE* OF THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC. IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* OF THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC. IN SUPPORT OF PETITIONER

INTRODUCTORY STATEMENT

This brief is submitted by the Air Transport Association of America, Inc. as *amicus curiae* in support of the petitioner in the above-captioned matter. Written consents of the petitioner and respondent have been obtained and filed with the Clerk of the Court.[1]

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[1] Pursuant to S. Ct. Rule 37.6, *amicus* states that no party to this case had any role in drafting this brief; nor did any person or entity other than *amicus* and its members provide any monetary support for its preparation or filing.

INTEREST OF *AMICUS CURIAE*

The Air Transport Association of America, Inc. (the "ATA") is an association of 23 U.S. and 5 foreign air cargo and passenger airlines, which was founded in 1936.[2] The ATA's various members operate within the United States and in virtually every state of the Union, and account for more than 97% of the domestic passenger and cargo traffic flown annually in the United States. A principal purpose of the ATA is to support its member airlines by promoting airline safety and presenting common industry positions. Since its inception in 1936, the ATA has been involved in the development of federal and international law governing domestic and international air transportation.

The ATA has played a significant role in most federal governmental decisions regarding aviation, including the formulation of various federal aviation acts, the creation of the Civil Aeronautics Board, the creation of the air traffic control system, and airline deregulation. The ATA is uniquely qualified to assess the adverse impact of the decision below on the United States air transportation industry and the carefully balanced economic scheme interposed by Congress. The ATA's members are uniquely harmed

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[2] The ATA's members are Airborne Express, Alaska Airlines, Aloha Airlines, America West Airlines, American Airlines, American Trans Air, Atlas Air, Continental Airlines, Delta Air Lines, DHL Airways, Emery Worldwide, Evergreen International, Federal Express, Hawaiian Airlines, Midwest Express Airlines, Northwest Airlines, Polar Air Cargo, Reeve Aleutian Airways, Southwest Airlines, Trans World Airlines, United Airlines, United Parcel Service, and USAirways, Associate members are Aerovias de Mexico, Air Canada, Canadian Airlines International, KLM-Royal Dutch Airlines, and Mexicana de Aviacion.

by the actions of states, like Hawaii, that choose to flaunt Congress' constitutional reservation of power to regulate and to protect this interstate industry.

SUMMARY OF ARGUMENT

The United States air transportation industry has evolved from its humble beginnings as a mail delivery system, into an effective, safe and timely means of interstate passenger transportation, and further into a nearly seamless globe-spanning air cargo and passenger network that sustains a robust national economy. This evolution, which in turn has facilitated the development and growth of other national industries and service sectors, has been the result of a delicate balance between federal and state and local regulatory powers over the structure of the national air transportation industry.

As part of this delicate balance, Congress explicitly prohibited state and local taxation of air transportation or the gross receipts therefrom. 49 U.S.C. § 40116(b). Nevertheless, the State of Hawaii persists in its refusal to acknowledge or to obey this restriction, by taxing the gross receipts of air cargo carriers.

The members of the air transportation industry have been forced to defend themselves against encroachments by the states on many other occasions. Unfortunately, the industry has not achieved consistent success in educating the states regarding the proper parameters of their taxing powers through the litigation process. In this case, the highest court of Hawaii—a court that has previously been reversed *on the identical question of federal preemption* by this Court—chose to interpret Congress' prohibition on taxation of gross receipts from air transportation

in a manner that evades Congressional intent to generate state tax revenues. In the face of such behavior, only this Court's intervention can effectively restore the delicate balance that Congress sought to introduce.

Moreover, this balance between federal and state prerogatives is critical to the resolution of this controversy. Permitting a state-tax obstacle course to crop up poses costs and other hazards to the air transport industry that were specifically contemplated and rejected by Congress when it originally enacted the federal preemption scheme at work in this case. This Court should clearly assert its authority to ensure that state action, as undertaken by Hawaii in this case, be rejected.

ARGUMENT

I. ONLY THIS COURT CAN CURB THE GROWING TREND OF STATES TO TAX THE AIRLINE INDUSTRY IN WAYS PROHIBITED BY CONGRESS

The United States air transportation industry has historically and consistently been a target of overreaching tax treatment by states and localities. There are several reasons for this unfortunate circumstance. The United States air transportation industry is inherently interstate. For this reason, the industry is an easy and politically advantageous target for taxation, both because these entities do not vote and because their customer bases likewise merely "pass through" the jurisdictions that subject them to tax directly or indirectly. Most critically to the controversy at hand, these jurisdictions seek creative theories to avoid Congress' affirmative exercise of its Commerce Clause powers to prohibit the imposition of specified taxes and fees.

In fact, Congress effected at least one specific amendment to former 49 U.S.C. § 1513 as a direct reaction to a state tax case, in order to reaffirm the statutory prohibition against targeted state taxation of air transportation. Section 1513(f), recodified as 49 U.S.C. § 40116(c), states: "A State or political subdivision of a State may levy or collect a tax on or related to a flight of a commercial aircraft or an activity or service on the aircraft *only if the aircraft takes off or lands in the State or political subdivision as part of the flight.*" (Emphasis added.) This amendment is widely acknowledged to have been made in reaction to cases like *Republic Airlines, Inc. v. Wisconsin Dept. of Revenue*, Dane County Cir. Ct. No. 89CV2916 (Feb. 12, 1990), *rev'd*, 464 N.W.2d 62 (Ct. App. 1990), wherein the lower court upheld sales and use taxes on in-flight distribution and consumption of food and beverages that occurred on "overflights," *i.e.*, flights whereby planes passed over the state but did not either take off from or land in a facility in the state.

Nevertheless, despite Congress' reinforcement of the prohibition, states have continued to tax air transportation in violation of the federal preemption statute. The tax at issue in *Director of Taxation of Hawaii v. Lynden Air Freight, Inc.*, 968 P.2d 653 (Haw. 1998), is one of the most recent in a long line of such taxes targeted at interstate air transportation, and the decision below is one of many that unlawfully expand the scope of state and local taxing power. A very brief survey of representative decisions rendered within the past five years alone demonstrates that state and local taxing authorities continue to willfully trespass into territory that clearly has been prohibited to them.

In *Delta Air Lines, Inc. v. Director of Revenue*, 908 S.W.2d 353 (Mo. 1995), the Department of Revenue insisted upon the inclusion of Delta's "bridge miles" (*i.e.*, miles Delta airplanes flew over Missouri without physically landing in or taking off from a facility in the State) in the numerator of the corporate income tax apportionment fraction, on the theory that the statute encompassed bridge miles within the term "mileage 'in the state.'" *Id.* at 355.[3] However, despite the Court's rejection of this theory, two other State revenue authorities have forced their supreme courts to revisit the identical issue. *Northwest Airlines, Inc. et al. v. Illinois Dept. of Revenue*, 692 N.E.2d 1264 (Ill. App. 1998), *leave to appeal denied*, 1998 Ill. LEXIS 979 (1998) (holding in favor of the taxpayer); *Commonwealth of Virginia, Dept. of Taxation v. Delta Air Lines, Inc.*, 1999 Va., Feb. 26, 1999) (holding in favor of the taxpayer).

The concerns of the air transportation industry are certainly not assuaged when one reviews recent encroachments by other states and localities upon territory specifically protected by Congress through 49 U.S.C. § 40116. Almost every type of state or local

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[3] Some tax professionals have referred to such a theory of tax jurisdiction as "groundhog nexus," *i.e.*, the nexus created by casting a shadow over the jurisdiction in question. However, this Court has clearly rejected such a notion as not constituting "substantial nexus" for Commerce Clause purposes. *Cf. Goldberg v. Sweet*, 488 U.S. 252, 263 (1989), *citing United Air Lines, Inc. v. Mahin*, 410 U.S. 623 (1973) ("State has no nexus to tax an airplane based solely on its flight over the State"). Furthermore, the effect of including such mileage would be to impose an unfairly apportioned corporate income tax on the airline.

tax action that is specifically prohibited by this provision—not just the taxation of the gross receipts from air transportation—has in fact been taken or proposed against cargo or passenger air carriers.

In *Northwest Airlines, Inc. v. County of Hennepin*, 537 N.W.2d 488 (Mn. 1995) (holding in favor of the taxpayer), the county argued that state law denied a taxpayer relief in the form of equalization of property tax rates, where the median assessment ratio level was 90% or higher. Thus, it refused to equalize Northwest's 100% assessment ratio to that of other taxpayers (the median assessment ratio for those taxpayers was 98.3%). The county asserted this limitation on entitlement to relief in direct contravention of 49 U.S.C. § 1513(d) (recodified as 49 U.S.C. § 40116(d) during the pendency of this case), which prohibits discriminatory state taxation (including the discriminatory provision of tax relief) of air carrier property.

In a very recent decision addressing the applicability of the federal preemption scheme to a state tax, a Florida Circuit Court reviewed the application of Florida's intangible property tax to that portion of American Airlines' accounts receivable consisting of accounts solely derived from the sale of air transportation, in light of 49 U.S.C. § 40116(a). *American Airlines, Inc. v. State of Florida, Florida Dept. of Revenue*, No. 95-4165 (Cir. Ct., Oct 12, 1998). In response to the taxpayer's objection that a tax on American's sales of air transportation on credit "falls squarely within the prohibitions of the statute," the State of Florida creatively argued that the tax was imposed on an "account receivable" (not air transpor-

tation) and that it was a "property tax."[4] *Id.* The Court held for the airline.

There is no sign that this trend of infringement will abate, as states continue to consider taxes on airlines that clearly run afoul of the federal preemption provisions. For instance, in 1997 Florida's Agriculture Commissioner proposed that a $5 tax be imposed on every commercial airplane that lands in Florida, in order to fund a war on pests and diseases that impact agricultural products. The proposal would have diverted air transportation revenues to the States's general usage; Congress clearly views such diversionary tax schemes as "inequitable." Florida Agriculture Commissioner Calls for New Tax on Ships, Airlines," Tax Analysts Doc. 97-24764 (Sep. 1, 1997); *cf.* Petition, p. 23.

This Court has on occasion recognized the need to revisit issues that it previously addressed in the context of state and local taxation, in order to reinforce principles and prohibitions that might appear to have been enunciated adequately. The impetus for such reexamination generally has been the pleas of taxpayers for relief when they are denied protections to which

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[4] This argument bears an uncanny resemblance to the argument made by Hawaii in *Aloha Airlines v. Director of Taxation*, 464 U.S. 7, 13-14 (1983), where Hawaii sought to evade the imprimatur of Congress by styling its gross receipts tax as a property tax, *measured* by gross receipts. This Court's views on such manipulations could not have been more clear: "The manner in which the state legislature has described and categorized [this tax] cannot mask the fact that the purpose and effect of the provisions are to impose a levy upon the gross receipts of airlines." *Id* This case is currently on appeal to the Florida District Court of Appeals, First District, Docket No. 98-4024.

they are clearly entitled. *Cf., e.g., Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) (revisiting *National Bellas Hess, Inc. v. Illinois Dept. of Revenue*, 386 U.S. 753 (1967), regarding the proper nexus threshold for sales/use tax purposes); *Reich v. Collins*, 513 U.S. 106 (1994) (insisting on the provision of a "clear and certain" remedy as prescribed in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990)). In such cases the Court has availed itself of the opportunity to augment the guidance available to tax administrators and taxpayers.

The decision below, and the trend it presages, presents a similarly compelling argument for this Court to clarify the parameters of federal preemption, in order to secure to the air transport industry the critical protections to which it is entitled by the Supremacy and Commerce Clauses. Indeed, this case presents a variation—poorly orchestrated—on an issue that the air transport industry thought this Court resolved in *Aloha Airlines* when it stated: "when a federal statute unambiguously forbids the States to impose a particular kind of tax on an industry affecting interstate commerce, courts need not look beyond the plain language of the federal statute to determine whether a state statute that imposes such a tax is pre-empted." *Aloha Airlines*, 464 U.S. at 12.

Notwithstanding the Court's "plain language," the states continue their patchwork efforts to chip away at Section 40116. Where an "express congressional command" has been issued, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992), and a state law is in conflict with that command, the state law is invalid. Congress has issued such a command with the enactment of 49 U.S.C. § 40116, and the Hawaii tax on

gross receipts derived from air transportation services must therefore fall.

II. THE RISKS OF SUCH ENCROACHMENT BY STATE AND LOCAL JURISDICTIONS CONSTITUTE THE VERY HAZARDS THAT CONGRESS SOUGHT TO PRECLUDE

The cumulative effect of piecemeal tax burdens that state and local jurisdictions place on the air transportation industry undermines the comprehensive, uniform, and efficient national air transportation system that Congress envisioned and sought to facilitate through its enactment of the preemption scheme at issue. 1973 U.S.C.C.A.N. at 1446-1450 (S. Rep. No. 93-12) ; *cf.* Petition, pp. 19-24. It has been the experience of the members of the ATA that such tax transgressions occur regularly and with increasing frequency.

The *Lynden* decision represents the very air transportation "tax creep" that Congress sought to eradicate. The costs to the industry, and hence to its commercial and individual/private customer bases, of this tax creep will be manifold. The costs of litigation, which industry members must regularly undertake to repel even the most transparent attempts to violate federal limitations on taxation of air transportation and air commerce, are already significant. The costs of compliance with tax schemes that rely on the allocation of gross receipts from air transportation to multiple state or local jurisdictions, or the costs of implementation and compliance with various other new taxes on air transportation, would likewise be extreme. The costs to implement new pricing structures that incorporate the tax variables that may or may not be uniform nationally will also take their toll.

Any shifting from the stern application of Congressional preemptive measures to all states—and particularly those that do not discern or respect the mandates of Congress or this Court the first time around—will give rise to the potential for other jurisdictions to read this decision as implicit encouragement to "join the fray." This Court has the unique ability to maintain the parameters of federal preemption *as required to protect this industry in the manner that Congress desired.*

CONCLUSION

For the reasons set forth above, the Air Transport Association of America respectfully requests that the Court grant a writ of certiorari and reverse the decision of the Hawaii Supreme Court.

Respectfully submitted,

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No. 98-1359

In The

Supreme Court of the United States

October Term 1998

LYNDEN AIR FREIGHT, INC.,

Petitioner,

v.

DIRECTOR OF TAXATION, STATE OF HAWAII,

Respondent.

On Writ of Certiorari to the Supreme Court
of the State of Hawaii

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Nothing in the Hawaii Director of Taxation's ("Hawaii's") opposition weakens the case for this Court's review. Hawaii does not dispute the significance of the decision below, that jurisdictions throughout the country will impose similar taxes if this Court declines review and that such taxes would have a substantial adverse impact on the air transportation industry. Hawaii also does not dispute that, under its apportionment theory, such jurisdictions could impose as much tax by "simply jacking up" the tax rate on the portion of receipts subjected to tax as they could if Congress permitted them to impose tax on total air cargo receipts. Op. Cert. 12. In addition, Hawaii does not dispute that, under the rationale adopted below, states and localities could discriminate against air transportation generally, *id.* at 13, or between different providers. Hawaii does not even defend its own discriminatory practices -- taxing Lynden and UPS but not the air cargo services offered by airlines such as United and Delta, even though they provide identical door-to-door pickup and delivery.

I. PREEMPTION: CAN A PORTION OF AIR CARGO GROSS RECEIPTS BE TAXED?

Hawaii also does not dispute that the decision below presents the question whether states and localities may apportion receipts from sales of air cargo services for the purpose of taxing them. Hawaii agrees there were no separate sales of ground transportation and therefore no receipts from such sales to tax. Op. Cert. 9 ("service provided by Lynden is essentially a complete delivery service" that gets the "package from shipper to recipient"). Hawaii agrees it devised a method to apportion gross receipts from Lynden's total sales of air cargo service, in order to allocate a portion to a category it designated as taxable. It agrees that this method calculates the costs of certain activities that take place on the ground and constructs a ratio of those costs to Lynden's total air cargo service costs, then multiplies that ratio against Lynden's total air

cargo receipts to determine the portion subjected to tax. Pet. App. 5a. Hawaii also agrees with Lynden's listing of the ground activities used to apportion sales receipts: pick up and delivery, sorting centers, sales, marketing, and administration.

The rhetoric in the opposition about mischaracterization does not refer to Lynden's detailed description of how the tax was calculated or which activities were designated as taxable. *See* Pet. 3-4. Hawaii's objection is to Lynden's shorthand references to its accurate and unchallenged detailed descriptions provided in the same filing. Op. Cert. 1-2. Hawaii prefers a different shorthand that assumes its legal conclusions, such as describing activities allocated as taxable as activities "properly associated with the ground transportation." *Id.* at 2. Hawaii's sole factual point, that there were ground costs it did not include in its formula, such as unloading freight from an airplane, is beside the point. *Id.* at 2-3. Lynden did not claim Hawaii included those particular ground costs, and Hawaii has not disputed anything Lynden claimed *was* included.[1]

Hawaii's legal position appears to be that, even though customers make a single purchase from an air cargo company, and even though the ground activities have no independent value to anyone not sending freight by air, states and localities may divide the costs of providing air cargo service into activity that "relates" to ground transportation and activity that "relates" to air transportation, and may tax a portion of air cargo receipts

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[1]Lynden further suggested that the rationale below does not provide a clear line between the ground activities Hawaii taxed and ground activities that, under the same theory, could be taxed by other jurisdictions. For example, if transporting freight from the airport to a recipient's store is taxable, so is delivery of lost luggage to someone's home. Lynden raised these issues with the understanding that this Court, in considering *certiorari*, is interested not only in the precise line drawn thus far by Hawaii, but also in the implications of its rationale for other jurisdictions and the future.

allocated to activity that "relates" to ground transportation. *Id.* at 2. That rationale argues forcefully for this Court's review because it is inconsistent with the preemption statute, 49 U.S.C. § 40116, inconsistent with this Court's decision in *Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7, 11 (1983), and is a significant threat to Congress' purposes in enacting the statute. Moreover, Hawaii's claim that Lynden has waived any claim with respect to line-drawing, Op. Cert. 4, is mistaken, as the stipulation it quotes makes clear. The issue before this Court -- whether any of these lines may lawfully be drawn -- is very much alive. Lynden agreed only to accept the specific amounts assessed if these taxes were not preempted.

Hawaii presumes that Congress enacted the provision solely to protect the air leg of air cargo transportation from state and local tax, but not to protect air cargo companies' sorting of packages to ensure freight is sent to the correct destination, or their scheduling of which packages will be sent on which planes, or their investigation of claims for missing freight, or their sales and marketing of air freight services, or their handling of freight once it is removed from the plane. That presumption, however, defies reason. Congress cannot be presumed to have enacted statutes to encourage an industry that left air freight on runways, sent packages to random locations, and kept its services secret from the public. Nor is it sensible to assume that Congress was indifferent to whether air cargo companies provide pickup and delivery when experience has proved that air cargo services are not attractive alternatives for most customers without pick up and delivery. Indeed, Congress' express declaration of its goals is inconsistent with such assumptions. Congress' goal is to encourage development of an all-cargo-air transportation *system* that is responsive to the present and future needs of shippers, commerce generally, and national defense. 49 U.S.C. § 1302 (1988); 49 U.S.C. § 40101. Further, its goal is to encourage "an integrated transportation

system," *id.*, that provides both the air carriage and trucking necessary to take a package from shipper to recipient. Contrary to Hawaii's contention, Op. Cert. 11, Congress is not indifferent to the components of Lynden's service that Hawaii asserts are outside the scope of Congress' preemption provision.[2]

Similarly, Hawaii's insistence that a tax on a portion of the service sold by air cargo companies will not affect the cost of the air cargo service and will not deter sales of the service, *id.* at 13, is absurd. Hawaii's tax department may see multiple services being offered. Customers see only one: air cargo service. Either the price at which it is offered is practicable, or it is not. If it is not, customers will ship freight by some other means, and jurisdictions that have imposed the additional cost will have deterred use of the air cargo transportation system Congress was trying to protect from *just* such interference.[3]

Hawaii's suggestion that a high tax on the portion of air

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[2]Furthermore, Congress expressly rejected a proposal to permit states to tax an apportioned share of gross receipts from air cargo and passenger services. *See* Pet. 20. Hawaii's suggestion that Congress rejected the proposal because it would have permitted taxation of "in-state removal of cargo from an airplane," Op. Cert. 12 n.9, is meritless. Had Congress intended to preserve some portion of such gross receipts for state and local taxation, it could have adopted the line Hawaii has drawn here, or any other line. Congress, however, rejected *any* apportionment of receipts from the sale of air cargo or passenger services for state and local tax purposes, and drafted its preemption provision broadly to insulate *all* receipts from such sales.

[3]Hawaii's contention that interfering with the uniform national pricing used by air cargo companies is not contrary to Congress' preemption provision absent evidence that the provision was enacted to ensure such pricing requires Congress to specify every event that could frustrate its purposes in order to have its statutes enforced. The federal legislature's hands are not so tightly bound. By enacting legislation, including tax preemption, to encourage the development of the air cargo industry, Congress precluded gross receipts taxes that deter development of that industry by disrupting uniform national pricing.

cargo receipts allocated to ground activities would further Congress' purposes by encouraging shippers to use aircraft for greater portions of the routes packages are shipped, *id.* at 12, is nonsense. The nature of air transport -- its speed -- already provides a dramatic advantage over surface transport. A shipper with tight time constraints uses air for as much of the route as possible. A shipper without time constraints ordinarily chooses surface transport if it is cheaper, avoiding air transport altogether. But no matter how high a tax Hawaii imposes on the portion of air cargo receipts allocated to ground activities, Lynden will not be able to pick up packages at customers' downtown locations and deliver them to the airport *by airplane*. Nor will aircraft be able to provide the other activities Hawaii taxed as "related" to ground transportation: sorting, routing, sales, public relations, and administrative functions.

Hawaii's position is not supported by the cases it cites as consistent with the decision below, *id.* at 15, because none presented the preemption question at issue here. None of the taxes challenged in those cases were imposed on a *portion* of a company's gross receipts from sales of air cargo or passenger services. None involved apportionment of gross receipts of any kind or a taxpayer that sold air transportation. In *Alamo Rent-A-Car, Inc. v. City of Palm Springs*, 955 F.2d 30 (9th Cir. 1992), and *Airline Car Rental, Inc. v. Shreveport Airport Authority*, 667 F. Supp. 293 (W.D. La. 1986), for example, the taxes at issue were imposed on the gross receipts car rental companies earned from renting cars. In *Salem Transportation Co. v. Port Authority*, 611 F. Supp. 254 (S.D.N.Y. 1985), the taxpayer operated a limousine service to and from certain airports. Its gross receipts were derived entirely from sales of that service. In *In re Dave's Motor Transportation, Inc.*, No. TSB-D-90(3)C, 1990 N.Y. Tax LEXIS 100 (N.Y. Tax App. Trib. Mar. 22, 1990), the challenged tax was imposed on a trucking company that provided pick up and delivery services

to airlines. Interestingly, the tribunal carefully limited its decision to a tax imposed on a trucking company paid solely to provide ground transportation, and distinguished it from a hypothetical tax on the door-to-door air cargo company that hired the trucker to perform pick up and delivery -- suggesting a tax on the air cargo company would be preempted. *Id.* at *9.

It is apparent that Hawaii's Department of Taxation remains hostile to this Court's interpretation, in *Aloha Airlines*, of federal preemption of taxes on gross receipts from sales of air transportation. Indeed, in its opposition, Hawaii reasserts arguments previously rejected by that decision. Hawaii again argues that the preemption provision should be read in terms of "Congress' desire to avoid the *double* taxation that would result if states as well as the Federal government taxed air transportation," Op. Cert. 14, reasserting the rationale that was rejected in *Aloha Airlines*, 464 U.S. at 12-13. In addition, Hawaii's continuing reliance on the progeny of *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), and other preemption cases deciding very different questions, Op. Cert. 16, disregards this Court's interpretation of the preemption provision as "a federal statute [that] unambiguously forbids the States to impose a particular kind of tax on an industry affecting interstate commerce." 464 U.S. at 12.

As this Court has recognized, interstate transportation companies are "easy prey for State and local tax assessors in that they are nonvoting, often nonresident, targets for local taxation, who cannot easily remove themselves from the locality." *Department of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 336 (1994) (quotation omitted). Hawaii's failure to repeal or amend the tax provision this Court held preempted 16 years ago in *Aloha Airlines*, its failure even to adopt regulations recognizing the decision and consistent with it, and its fifteen-year mission to carve significant exceptions out of that decision,

demonstrate the urgent need for clarification from this Court.[4] Moreover, declining to review the decision below would be interpreted by states and localities throughout the country as indicating that *Aloha Airlines* and the preemption provision are far narrower than they had thought, and that imposing taxes on significant portions of the receipts from air cargo sales, and even passenger sales, might well pass muster.

II. THE STATUTORY DEFINITION QUESTION

Hawaii's opposition provides no basis to conclude that its interpretation of the statutory definition of "interstate air transportation" is, as it asserts, the only conceivable reading or that the question has been resolved in the lower courts. Hawaii's plain meaning argument fails to appreciate that statutes commonly set forth general statements and then modify them by subsequent clauses. Thus, reading the opening phrase of the definition ("interstate air transportation" means "the transportation of pasengers or property by aircraft as a common carrier for compensation") as modified by the last clause ("when any part of the transportation is by aircraft") is a natural reading of the text. 49 U.S.C. § 40102(25). As Hawaii acknowledges, some courts have focused on the definition's use of the phrase "by aircraft" in these definitions. Op. Cert. 19-20. Other courts, however, including two courts of appeals, have read the provision as a whole to conclude that transportation meets the statutory definition of *air* transportation if *some* part of the transportation is by aircraft. The continuing confusion among the lower courts as to the proper interpretation of this and

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[4]Hawaii's indignant claim that it did not choose to view *Aloha Airlines* as limited to passenger transportation is belied by its own history of trying to impose its tax on the *total* gross receipts of air cargo companies *after Aloha Airlines* was decided. *See, e.g., Air Polynesia, Inc. v. Freitas*, 742 F.2d 546 (9th Cir. 1984); *Air Polynesia, Inc. v. Director of Taxation*, Docket No. 2250 (Haw. Tax Appeal Court May 24, 1985).

parallel definitional provisions is incompatible with the uniform national air transportation scheme Congress enacted, and argues strongly for this Court's review of the decision below.[5]

Hawaii's dismissal of the decisions disagreeing with its position as inapposite is unmerited. Particularly hard to understand is its dismissal of *City of Philadelphia v. Civil Aeronautics Bd.*, 289 F.2d 770 (D.C. Cir. 1961). Hawaii concedes that the D.C. Circuit interpreted the "interstate air transportation" definition to conclude that, for cargo shipped from California to Philadelphia, the *entire* trip was interstate *air* transportation, even though the final leg of the trip -- Newark to Philadelphia -- was by truck. Op. Cert. 16. This is the precise opposite of the interpretation adopted below. Under the D.C. Circuit's reading, what Hawaii calls Lynden's "complete delivery service," *id.* at 9, is interstate *air* transportation, even though small distances at the beginning and end are by truck. Since the entire service is interstate air transportation, all receipts from sales of the service are necessarily receipts from air transportation, and Hawaii's tax is preempted. Thus, the D.C. Circuit's interpretation of "interstate air transportation" would make it unnecessary to even reach the question whether the preemption provision permits receipts from sales of air cargo services to be *apportioned* for tax purposes.

The 10th Circuit has reached the same conclusion as the

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[5]The definitions of "interstate air commerce," "foreign air transportation" and "foreign air commerce" are parallel. The "interstate air commerce" definition uses identical language, § 40102(24); the modifying clauses in the "foreign air commerce" and "foreign air transportation" definitions are parallel: "when any part of the transportation or operation is by aircraft." § 40102(22), (23). Earlier versions of these definitions included equivalent language: "whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation." 49 U.S.C. § 1301(20), (21) (1974); 49 U.S.C. § 1301 (23), (24) (1988).

D.C. Circuit. *See Hill v. National Transp. Safety Bd.*, 886 F.2d 1275 (10th Cir. 1989). Hawaii's basis for asking this Court to disregard that interpretation by a unanimous panel of a United States Court of Appeals, set forth to explain its decision, is that it was discussed in a footnote. Op. Cert. 17. Hawaii's attempt to distinguish a third decision reaching the same conclusion is equally specious. In *United States v. Petrykievicz*, 809 F. Supp. 794 (W.D. Wash. 1992), the court reached the same conclusion as the two Courts of Appeals. Hawaii's dismissal of the case on the ground that it dealt "with the different definition of 'foreign air commerce,'" Op. Cert. 18 n.14, ignores the fact that "interstate air commerce" and "foreign air commerce" are given the same definition in the same subsection, *see* 49 U.S.C. § 1301(23) (1988), and identical language is used to define "interstate air transportation." § 1301(24).[6]

Similarly, Hawaii's *reductio ad absurdum* statutory interpretation argument does not withstand scrutiny. Its main argument for reading the statutory definition to include only those segments of a shipment that are provided by aircraft, rather than all shipments that travel at least partly by aircraft, is that Congress could not have intended to include shipments in which "the air segment was only a minor part of the overall voyage." Op. Cert. 8. Had Congress been faced with such possibilities, it might have chosen to draft its statute more narrowly. Congress, however, was not. For example, Lynden has calculated the cost and time for the example Hawaii relies on, both by the hypothetical route Hawaii posits from Denver to Maui, *id.*, and by air, for a typical freight shipment of 100 lbs. Shipment by the method posited by Hawaii would require approximately 16 days and cost at least $193. Shipment by air,

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[6]Hawaii's dismissal of the express text of 14 C.F.R. § 222.2 as "not carefully worded" and its substitution of a preferred interpretation, Op. Cert. 11 n.8, is premised neither on cited authority nor known interpretative tools.

with truck pick up and delivery at either end, would require 3 days and cost $80. Since Congress could reasonably rely on market pricing and timing to motivate shippers to choose less costly, less time-consuming routes, its failure to draft the statute to exclude such unrealistic hypotheticals can legitimately be read only to indicate that Congress knew its general language would suffice because there was no danger of economically irrational transportation choices circumventing its intent.

This Court's guidance as to the proper interpretation of these statutory definitions would have a substantial impact, because these provisions delineate agency powers and governing rules with respect to many aspects of interstate and foreign air transportation. The decision below presents both the preemption and the definitional questions squarely and cleanly.

CONCLUSION

The petition for a writ of certiorari should be granted.

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